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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 211

CITIES SERVICE OIL COMPANY,
Petitioner,

vs.

WALTER N. TOBRINER, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Cities Service Oil Company, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on May 31, 1962.

Opinions Below

The decision of the United States District Court of June 28, 1957, which originally dismissed the plaintiff's complaint *sua sponte*, before answer and without a trial, is unreported. (Infra, app. p. 64A). The decision of the Court of Appeals of May 29, 1958, affirming such order of dismissal, is unreported. (Infra, app. p. 65A to 66A). The decision of the Court of Appeals of September 10, 1958, granting a rehearing of its opinion and order and

remanding the case to the District Court "with directions to grant a preliminary injunction and to hold a hearing on the complaint and decide whether appellant must have a general agent in the District of Columbia in order to qualify for a license", is unreported. (Infra, app. p. 67A). The decision of the District Court of October 3, 1960, on remand granting summary judgment in favor of respondents, is unreported. (Infra, app. p. 68A). The Court of Appeals' reversal and remand to the District Court of May 25, 1961 is reported at 292 F. 2d 759. (Infra, app. p. 69A to 70A). The petitioner's motion for rehearing and the denial by the Court of Appeals of July 18, 1961 is unreported. (Infra, app. p. 71A). The final dismissal of plaintiff's complaint by the District Judge, *sua sponte*, on remand and the order for stay of November 27, 1961, are unreported. (Infra, app. p. 72A to 73A). The Court of Appeals order granting a stay of December 7, 1961 is unreported. (Infra, app. p. 74A). Affirmance of the dismissal of the complaint by the Court of Appeals on May 31, 1962 is as yet unreported. (Infra, app. p. 75A to 76A). The Court of Appeals of June 12, 1962 staying the mandate is unreported. (Infra, app. p. 77A). On June 22, 1962 The Court of Appeals' order denying petitioner's application for an injunction to restrain respondents from restricting or interfering with appellant's importation and delivery of motor vehicle fuel in the District of Columbia pending an application for a writ of certiorari of June 21, 1962 is unreported. (Infra, app. p. 78A).

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 31, 1962 (Infra, app. p. 75A). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented

I.

Has there not been a departure from the accepted and usual course of judicial proceedings amounting to a denial of due process when a case is dismissed, *sua sponte*, without challenge of the sufficiency of the complaint and without trial and without disposition of a constitutional question raised with respect to the application of a provision of the District of Columbia Code and of a Régulation promulgated thereunder?

II.

Where, as in this case, the administrative agency predicated its administration of the licensing statute solely on the requirement that foreign corporations have a resident general agent in the District, did not the Court of Appeals depart from the judicial function and enter the administrative when, after holding such requirement to be invalid, it suggested a new administrative requirement which had at no time been imposed by the District, with the result that the District thereafter wrote such requirement into its procedure and denied petitioner a license on the ground suggested by the Court of Appeals?

III.

Where a case is litigated throughout on a single issue framed by the parties and the Court of Appeals—"whether appellant must have a general agent in the District of Columbia in order to qualify for a license"—and such issue is decided favorably to appellant, and the Court then utters a clear *obiter dictum* by expressing a requirement—that the appellant must have a local

office or place of business in the District in order to qualify for a license—which was at no time contended or litigated; does such *obiter dictum* constitute "the law of the case" in a later appeal and bind the Court and the parties?

Constitutional Provisions, Statutes and Regulations Involved

Amendment V to the Constitution of the United States is as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 3 of the Act of April 23, 1924, the Motor Fuel Tax Law, 43 Stat. 107, ch. 131 as amended by Section 3, Title III of the Act of August 17, 1937, 50 Stat. 677, ch. 690, Section 47-1903(a) and Section 47-1916 D. C. Code (1961), provides, in pertinent part, as follows:

> "Sec. 3(a) No person shall bring into, or produce, refine, manufacture, or compound in the District of Columbia motor-vehicle fuel to be used by him or to be sold, bartered, delivered for value, or exchanged for goods, and no person shall engage in the business of importer of motor vehicle fuels in the District of Columbia unless such person is the holder of an unrevoked license authorizing him so to do issued by

the Commissioners. The application for such license shall contain (1) the name of the applicant; (2) the name under which the applicant intends to transact business and the name and place of business of the local representative; (3) the location of the applicant's place of business; (4) the date such business was established; and (5) any other information required under regulations promulgated by the Commissioners of the District of Columbia. In case the applicant is a corporation, the application shall also contain the corporate name, place and time of incorporation, and the names of the officers and directors, and, if a foreign corporation, the name of its resident general agent, and in case the applicant is a partnership the names and addresses of the several persons constituting the partnership. Such application shall be signed and sworn to by the owner of such business, if owned by an individual; by the partners, if owned by a partnership; or by the president and secretary of the corporation, or by its manager or resident general agent, if owned by a corporation. * * *"

"Sec. 47-1916. Commissioners to Make Necessary Regulations.

"The Commissioners may make such regulations as in their judgment are necessary for the administration of Section 47-1901 to 47-1916. * * *"

Article 26 of the Police Regulations for the District of Columbia provides as follows:

"Sec. 2—Every licensed importer shall designate a local representative and maintain a local office or place of business within the District of Columbia. * * *"

Statement of the Case

The complaint (Infra, app. p. 1A to 4A) sought an injunction restraining the respondents from restricting or interfering with the petitioner in the importation and

distribution of motor fuel in the District of Columbia subsequent to June 30, 1957 and a declaratory judgment to the effect that under Section 47-1903, D. C. Code (1951 Edition) the petitioner is not required, as contended by respondent upon the denial of petitioner's application for license, to designate and maintain a resident general agent in the District of Columbia as a condition of obtaining a motor fuel importer's license.

The petitioner, a long-time holder of a motor fuel importer's license, filed an application with the respondents for a motor fuel importer's license for the year commencing July 1, 1957 and tendered the required fee and stood ready to furnish the necessary surety bond. The application, submitted on respondent's form, stated that petitioner did not have a resident general agent and set forth the name of the petitioner's agent for the service of process in the District of Columbia (Infra, app. p. 14A to 20A).

On June 13, 1957, the respondents rejected petitioner's application for the renewal license on the sole ground, reiterated four times prior to suit, that petitioner did not set forth in its application the name of its "resident general agent" in the District of Columbia (Infra, app. p. 6A to 11A).

As may be seen from Exhibits "A", "B", "C" and "D" attached to the answer of respondents in this case (Infra, app. p. 6A to 11A), the respondents' refusal to issue a license to petitioner was communicated by them to it in pertinent part as follows:

> "A foreign corporation must report a bona fide resident general agent in the District of Columbia. A registered agent for the service of process only is not a resident general agent." (Exhibit "A" of

answer, letter of May 9, 1957." (Infra, app. p. 6A to 7A):

* * *

"Section 47-1903 (D. C. Code) reads in part, as follows: * * * and, if a foreign corporation, the name of its resident general agent * * *"

"Question 12 requesting name of the resident general agent shows—

"NONE—Limited Agent—United States Corporation Co., 1111 National Press Building, Washington, D. C.

"It will be necessary to show the name and address of a resident general agent authorized to transact any business in the District of Columbia before a license can be issued." (Exhibit "B" to answer, letter of June 6, 1957) (Infra, app. p. 8A to 9A).

* * *

"In this letter we have requested you to show the name and address of a resident general agent authorized to transact any business for the company in the District of Columbia before a license can be issued." (Exhibit "C" of answer, letter of June 11, 1957) (Infra, app. p. 9A to 10A).

* * *

"The application is rejected for the following reasons previously outlined in our letter of June 6, 1957 and June 11, 1957:

"Section 47-1903 (D. C. Code) reads in part as follows: * * * and, if a foreign corporation, the name of its resident general agent * * *.

"Question 12 requesting name of the resident general agent shows—

"None—Limited Agent—United States Corporation Co., 1111 National Press Building, Washington, D. C.

"It will be necessary to show the name and address of a resident general agent authorized to transact any business in the District of Columbia before a

license can be issued." Exhibit "D" of answer, letter of June 13, 1957. (Infra, app. p. 10A to 11A).

The issue of this case was framed by the Court of Appeals in its decision of September 10, 1958, the first appeal herein, where, in remanding the case to the District Court, it stated:

> "* * * This case be and it hereby is remanded to the District Court with directions to grant a preliminary injunction and to hold a hearing on the complaint and decide whether appellant must have a general agent in the District of Columbia in order to qualify for a license."

The respondents themselves similarly posed the issue in the following words in their brief filed on the second appeal:

> "Appellees' Statement of Question Presented
>
> "Was not appellant, as a condition precedent to the approval of its application for motor vehicle fuel importer's license, required to designate a resident general agent and state in the application the name and address of such resident general agent?"

After the Court of Appeals in the first-mentioned appeal remanded the case to the District Court for a hearing, that court on October 3, 1960 granted summary judgment in favor of the respondents which, on May 25, 1961, was reversed by the Court of Appeals, with remand to the District Court for further proceedings. In the last-mentioned appeal, the Court of Appeals decided favorably to the petitioner the only issue which had been framed and litigated before it, stating:

> "If the corporation does not have a representative within the District who is a 'resident general agent' the statute does not require the corporation to procure and designate an agent of that description."

Assuming, on the basis of the foregoing portion of the Court of Appeals' decision that it would be granted a license on filing an application therefor, petitioner filed an

application dated June 1, 1961 for a current motor fuel importer's license (Infra, app. p. 46A to 50A). The respondents, through the corporation counsel, advised petitioner that its application was unsatisfactory in that the petitioner had not complied with the requirement, introduced into the license application form after the decision of the Court of Appeals, of stating the address of a local office or place of business in the District of Columbia. The new requirement imposed by the District presumably derived from a statement in the Court of Appeals' opinion of May 25, 1961, to the effect that:

> "However, considering the nature of the business of importing motor fuel, the supervision of such business intended by the Motor Fuel Tax Law, and the Article 26 Regulation referred to above, the importer, to qualify for a license, is required to designate a local representative and maintain a local office or place of business within the District of Columbia. In the absence of an agent known as a 'resident general agent', compliance with the licensing statute requires the designation in the application of such a representative as the regulation specifies. We think this is a reasonable construction of the statute. It avoids giving the reference to a 'resident general agent' a construction which requires an agent of that precise description, while at the same time it does require a local representative of requisite authority to be designated and specified in the application for a license." (Infra, app. p. 69A to 70A).

Thereafter, on the basis of discussions with and suggestions from the respondent's Corporation Counsel, the petitioner filed a revised application dated August 16, 1961. Although it was initially indicated that this application would be accepted by the respondents, it was ultimately rejected. (Infra, app. p. 46A to 49A).

To remove the decisional obscurity resulting from the last-quoted portion of the Court of Appeals' opinion, petitioner, on June 20, 1961, moved the Court of Appeals for

a rehearing and to recall and to stay the judgment so as to clarify the opinion. The Court of Appeals denied such motion.

Thereafter, on October 4, 1961, petitioner moved in the District Court for an order, pursuant to the judgment of the Court of Appeals, to compel the respondents to issue a motor fuel importer's license to it for the year beginning July 1, 1961, pursuant to the current license application which had been filed by petitioner and, on the hearing of the motion, requested a trial if the Court should deny the motion to direct the issuance of the license. (Infra, app. p. 45A).

The District Court, by order dated November 28, 1961, denied this motion and, *sua sponte,* made an order dismissing the action, and dissolved the injunction which previously had preserved the right of petitioner to import motor fuel in the District of Columbia pending the final disposition of the case. (Infra, app. p. 72A to 73A).

The Court of Appeals on May 31, 1962 affirmed the opinion of the District Court, holding that the last-quoted portion of the Court's decision in the earlier appeal established the law of this case even though the holding in the earlier appeal had been in petitioner's favor on the single clear question that had been framed and litigated in said appeal. (Infra, app. p. 75A to 76A). On June 1, 1962, petitioner moved the Court of Appeals to stay the mandate and applied for an injunction pending this petition for certiorari. The motion to stay the mandate was granted on June 12, 1962. (Infra, app. p. 77A). The application for the injunction pending certiorari was denied on June 22, 1962. (Infra, app. p. 78A).

At no time has petitioner been granted a trial on the merits; there has been no determination of the question raised by the petitioner of the constitutionality of the requirement that an applicant for a District of Columbia motor fuel importer's license have a resident general agent or an office or place of business in the District.

REASONS FOR GRANTING THIS WRIT

I.

There has been a departure from the accepted and usual course of judicial proceedings amounting to a denial of due process in the dismissal of this case, *sua sponte*, without challenge of the sufficiency of the complaint and without trial and without disposition of the constitutional question raised with respect to the application of a provision of the District of Columbia Code and of a Regulation promulgated thereunder.

Apart from dismissal for non-prosecution, there are but two ways in which a law suit may be determined; dismissal of the complaint for insufficiency, and dismissal after trial or after the equivalent of trial, as by motion for summary judgment. In the instant case, a dismissal of the complaint was directed, apparently on the merits, notwithstanding the fact that there has been no claim or finding of insufficiency of the complaint and no trial nor disposition by summary judgment. Judicial procedure has been formulated over many centuries for the purpose of affording litigants due process of law in the adjudication of their rights and grievances, and conformity to established procedure goes to the very essence of due process. *Snyder* v. *Massachusetts* (1934) 291 U. S. 97, 78 L. Ed. 674, 54 S. Ct. 330; *Powell* v. *Alabama* (1932) 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55; *Blackmer* v. *United States* (1932) 284 U. S. 421, 76 L. Ed. 375, 52 S. Ct. 252; *Mullane* v. *Central Hanover Bank & Trust Co.* (1950) 339 U. S. 306, 94 L. Ed. 865, 70 S. Ct. 652; *Galpin* v. *Page* (1873) 18 Wall 350, 21 L. Ed. 959; *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.* (1933)

289 U. S. 266; 53 S. Ct. 627, 77 L. Ed. 1166; *L. B. Wilson Company, Inc. v. F.C.C.* (1948) 170 F. 2d 793, 83 U. S. App. D. C. 176.

In the instant case the petitioner has at all times asserted two grounds for relief: first, that the District of Columbia Code did not require it to have a resident general agent as a prerequisite to obtaining a motor fuel importer's license; and, second, that if the statute be construed to impose such a requirement, the same would be unconstitutional because it is arbitrary and in no way related to the purposes and administration of the statute. As is shown in the affidavit appearing at pages 22A to 31A of the Appendix, the District of Columbia at no time had any dealings of any nature whatsoever in the District of Columbia with any resident general agent of any motor fuel licensee. This proof, obtained by pretrial deposition from the respondents themselves, clearly shows the substantiality of the constitutional question which the petitioner was prepared to document by proof at a trial. This same evidence indicates also the substantial proof which could be adduced on a trial by petitioner to prove the arbitrariness and lack of relation to administrative function of the requirement, suggested and then affirmed by the Court of Appeals, that foreign corporation motor fuel licensees have an office or place of business in the District.

Further proof that would be adduced on the trial that up to now has been denied petitioner would be the circumstance that the respondents' new-found interest in having resident general agents or local offices within the District of Columbia comes, not from considerations of administrative necessity or convenience to have the importers' representatives located in the District of Columbia but, rather, from respondents' desire to use the requirement as a means of denying franchise tax exemption which would

otherwise be available to a non-resident foreign licensee under District of Columbia Code 47-1551c(h) (1951).

Petitioner established without contradiction in pre-trial proceedings that prior to its being granted an exemption from franchise taxes by the District Court, which was affirmed in *District of Columbia* v. *Cities Service Oil Company* (1958) 103 U. S. App. D. C. 332, 258 F. 2d 426, the respondents had no interest in the nature of the representative that petitioner had within the District of Columbia. It was only after petitioner established an exemption from franchise tax that respondents became vitally interested that petitioner maintain a resident general agent in the District.

Additional highly significant proof that respondents have no bona fide requirement of a resident general agent or local office in connection with the administration of the statute is found in the circumstance that respondents granted licenses to foreign corporations who named as resident general agents well-known corporate service companies, who function only as agents for service of process, while denying a license to petitioner which named the self-same type of corporate agent for service of process in its application.

Due process requires that litigated matters be disposed of in accordance with established procedure. It is submitted that "short-cuts" in this area are inappropriate and certainly that they are altogether without justification when they foreclose a party from the opportunity of having a trial and offering proof of a constitutional question as to which a record showing of substantiality has already been made. *Akron, C. & Y. Railroad Co.* v. *United States* (1922) 261 U. S. 184, 67 L. Ed. 605, 43 S. Ct. 270; *B & O Railroad Co.* v. *United States* (1936) 298 U. S. 349,

80 L. Ed. 1209, 56 S. Ct. 797; *Holmes* v. *Conway* (1916) 241 U. S. 624, 60 L. Ed. 1211, 36 S. Ct. 681; *Truax* v. *Corrigan* (1921) 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254. In the instant case the petitioner explicitly raised the due process question before the District Judge and requested the right to go to trial on the question. The answer of the District Judge was, "I am not going to try that issue". (Infra, app. p. 59A). Due process recognizes no right in a Court to refuse to try an issue. If the issue is without legal substance it may be dismissed for insufficiency; if it withstands such attack; then it may be dismissed only after the trier of the fact finds the proof insufficient to sustain it. In the instant case there has been such a departure from accepted judicial procedure as to constitute a violation of due process and require the intervention of the United States Supreme Court.

II.

The Court of Appeals, in suggesting a new administrative requirement not urged by the administrative agency or in issue in the litigation, improperly departed from the judicial function and entered the area of the administrative function.

Simply stated, a Court is supposed to resolve issues, not create them. In the instant case, there was only one issue before the Court of Appeals when it made its decision of November 14, 1961. *Cities Service Oil Company* v. *McLaughlin, et al.*, (1961 App. D. C.) 292 F. 2d 759. This issue—whether an applicant for a motor fuel importer's license was required to have a resident general agent in the District of Columbia—had been framed by the Court

itself and repeatedly stated by the respondents as the sole question in the case. (Infra, App. p. 67A). It was the duty of the Court of Appeals to pass on the District Court's disposition of this issue in the order before it for review. Had the Court performed this function without going further, this case would now be at rest. Instead, after deciding the sole question of the case favorably to the petitioner, the Court of Appeals proceeded to advance a new administrative requirement—that the licensee have an office or place of business in the District—which had at no time theretofore been imposed by the administrative agency. The suggestion contained in the Court's obiter dictum was quickly adopted by the administrative agency, with the consequence that a new case, within the original case, actually eventuated. In other words, after the petitioner had prevailed on the issue of its right to receive an importer's license without designating a resident general agent, it found itself confronted, in the same litigation, with the Court-created issue of whether it was required to have an office or place of business in the District as a condition of obtaining its license. It is not the function of the Courts to generate new questions and protract litigation, but, rather, to decide the issues of each case as framed by the parties themselves. The rule is clearly stated by this Court in *Mills* v. *Green* (1895) 159 U. S. 651, 40 L. Ed. 293, 16 S. Ct. 132, as follows:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."

Had the Court of Appeals followed its judicial duty in the manner above stated, it would have limited its determination to deciding, as it did, that the appellant was not required to have a resident general agent as a condition of obtaining a license. From this decision of the actual controversy between the parties there would have eventuated "a judgment which can be carried into effect", that is, a judgment directing the respondents to issue a motor fuel importer's license to the appellant. Instead, when the Court of Appeals undertook to give an opinion on an abstract proposition and "to declare principles or rules of law which cannot affect the matter in issue in the case before it", as it did by gratuitously advancing the proposition that appellant is required to have an office or place of business in the District, it issued a determination which self-evidently could not be cast into a judgment granting or denying a license, as the parties were not in controversy over any requirement of having an office or place of business in the District. In effect, the Court of Appeals assumed the role of the administrator in suggesting the new requirement. The reality of this and the litigation complication ensuing therefrom are made amply clear when it is seen that, immediately after the utterance of the Court's dictum, the respondents modified their application form to require what they had never theretofore required—a statement of the applicant's office or place of business in the District.

Thus, in a case which was actually finally determined and in a posture for final judgment, there was created a new issue—a case within a case—as the direct consequence of the Court of Appeals' obiter dictum cast in the form of an administrative requirement not theretofore imposed by the administrative agency. As stated by this Court, quoting from another of its decisions, in *N.L.R.B.*

v. *Gullett Gin Company Inc.* (1950) 340 U. S. 361 at page 363, 71 S. Ct. 337; 95 L. Ed. 337:

> "Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy."

When the Court of Appeals in this case, after deciding that the appellant was not required to have a resident general agent and was thus entitled to a license, proceeded to point out what it conceived to be a new basis for denying a license to appellant, it doffed the judicial mantle of impartiality and, in effect, ranged itself on the side of appellant's adversary. In so doing, it renewed and protracted a litigation which, properly and legally, was then at an end. This it should not have done.

III.

An administrative agency may not, by regulation, impose a requirement transcending the requirements of the statute under the authority of which the regulation is issued.

The Court of Appeals' conclusion that an applicant for a motor fuel importer's license is required to have an office or place of business in the District derives from Article 26, Section 2, of the Police Regulations of the District of Columbia, which purports to impose such a requirement. The regulation is issued under the authority of Section 47-1916 of the Motor Fuel Tax Law, which states that "The commissioners may make such regulations as in their judgment are necessary for the administration of Section 47-1901 to 1916 * * *." Insofar as licensure is concerned, the relevant section of the statute

is Section 47-1903(a), which imposes five specifications in respect of the application for license: (1) the name of the applicant; (2) the name under which the applicant intends to transact business and the name and place of business of the local representative; (3) the location of the applicant's place of business; (4) the date such business was established; and (5) any other information required under regulations promulgated by the Commissioners of the District of Columbia.

It is clear from the foregoing, particularly subdivision 3, that the statute contains no requirement whatsoever that an applicant for a motor fuel importer's license have a local office or place of business in the District. It is equally clear that subdivision 5 quoted above authorizes the administrative agency to require "information" by regulation, but not to impose additional requirements beyond those expressed in the statute. This Court has already spoken on the proposition of administrative action by regulation in a manner which is out of harmony with the authorizing statute. In *Manhattan General Equipment Company v. Commissioner*, (1936) 297 U. S. 129, 134, 56 S. Ct. 397, 80 L. Ed. 528, this Court said:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress but the power to adopt regulations to carry into effect the will of Congress as pressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch* v. *Tilden Product Co.*, 265 U. S. 315, 320-322; *Miller* v. *United States*, 294 U. S. 435, 439-440, and cases cited. And not only must a regulation in order to be valid, be consistent with the statute, but it must be reason-

able. *International Ry. Co. v. Davidson*, 257 U. S. 506, 514. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable."

It is submitted that the regulation which was the basis of determination by the Court of Appeals is not valid under the statute and cannot support the determination of the Court of Appeals. Further, as suggested herein, the petitioner is able to adduce proof, but has been foreclosed therefrom, to show the requirement to be unreasonable and demonstrably unrelated to the function and administration of the statute, and therefore invalid for this further reason under *Manhattan General Equipment Company v. Commissioner, id.* and *International Ry. Co. v. Davidson* (1922) 257 U. S. 506, 514, 66 L. Ed. 341, 42 S. Ct. 179, cited therein.

IV.

Obiter dictum as to matters not previously litigated cannot become the "law of the case"; nor does this principle, even if applicable, require that an erroneous determination be followed without correction.

The Court of Appeals' decision of May 31, 1962 offers no substantive justification of its decision on the prior appeal, *Cities Service Oil Company v. McLaughlin, supra.* The Court stands squarely on "the law of the case", saying:

> "Our previous decision set forth qualifications a motor fuel importer must satisfy in order to obtain a license under the statute. Our decision became the law of the case and was followed by the District

Court. The judgment of the District Court accordingly is affirmed."

The decision that the Court of Appeals says became the law of the case is one that was not susceptible of review because of its interlocutory nature. *United States of America* v. *United States Smelting, Refining and Mining Company* (1950) 339 U. S. 186, 94 L. Ed. 750, 94 S. Ct. 737.

Its own prior decision relied on by the Court of Appeals was one in which the petitioner was the successful party in that it obtained reversal of an order granting the respondents summary judgment and a dismissal of the complaint; obviously the petitioner would not and could not appeal from this determination nor could it have any review of the *obiter dictum* which, in effect, was uttered *in vacuo*.

The Court of Appeals appears to have grounded its decision herein on two premises, both of which are erroneous; first, that it laid down the law of the case when it uttered an *obiter dictum* as to a matter neither pleaded nor argued and, second, that a court is inexorably bound by the principle of the "law of the case". The first of these assumptions is interestingly refuted in an opinion by Mr. Justice Field of this Court in *Barney* v. *Winona and St. P. R. Co.* (1886) 117 U. S. 228, 231, 29 L. Ed. 858, 859, 6 S. Ct. 654, wherein he stated:

> "We said, however, that the grant of these additional sections might be regarded as one of quantity; an inadvertence for which the writer of that opinion, who is also the writer of this one, is alone responsible. The statement was not at all material to the decision, which was that a deduction should have been made by reason of the intersection of the two

grants, so far as the prior grant was located within the extension.

> "We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal on similar facts. The first decision is the law of the case and must control its disposition; but the rule does not apply to expressions of opinion on matters the disposition of which was not required for the decision."

As to the question of whether the principle of "law of the case" is inexorably binding even in the face of error or so as to permit a court to ignore gross error, it suffices to quote Mr. Justice Holmes in *Messenger v. Anderson* (1912) 225 U. S. 436, 444, 56 L. Ed. 1152, 1156, 32 S. Ct. 739, wherein he stated:

> "In the absence of statute the phrase "law of the case", as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

To the same effect is *United States of America v. United States Smelting, Refining and Mining Company*, supra.

In the instant case the Court of Appeals has closed the door to substantive consideration of the correctness of the District Court's decision by stating that such decision followed the law of the case, a dictum laid down by the Court of Appeals in the prior appeal. This operates with a Kafka-like effect to deny petitioner any element of fair-play or due process. In the first instance,

the Court laid down an *obiter dictum* as to a matter that was neither pleaded, briefed, argued or so much as mentioned in the case. Then, having done this, it decided the later appeal by saying that it will take no account of the correctness or incorrectness of its earlier dictum—that it is binding as the law of the case. It is submitted that the principle of law of the case does not apply, and even if it did, it is not so immutable in application as to foreclose the correction of the judicial error which is here so manifest.

Conclusion

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE H. COLIN
Counsel for Petitioner
60 Wall Street
New York 5, N. Y.

Of Counsel:
EDWIN J. GORDON
JACK B. JOEL
ROBERT W. THABIT

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Filed June 19, 1957

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Action No. 1475-57

CITIES SERVICE OIL COMPANY, a Corporation, 60 Wall Street, New York, New York, *Plaintiff*,

ROBERT E. McLAUGHLIN, DAVID B. KARRICK, THOMAS A. LANE, BRIG. GEN., Commissioners of the District of Columbia, District Building, Washington, D. C., KENNETH BACK, Assessor for the District of Columbia, District Building, Washington, D. C., *Defendants*.

Complaint for Injunction and Other Relief

1. The jurisdiction of this Court is invoked under Title 11, Section 306, of the District of Columbia Code of 1951, Title 28, United States Code, Sections 1331, 1332, and Title 28, United States Code, Sections 88, 2201 and 2202. This Court also has inherent power to grant the relief requested herein. The amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.

2. Plaintiff, Cities Service Oil Company, is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its principal office at 60 Wall Street, New York, New York.

3. Defendants Robert E. McLaughlin, David B. Karrick and Thomas A. Lane, Brigadier General, constitute the Commissioners and the Board of Commissioners of the District of Columbia. Defendant Kenneth Back is the Assessor for the District of Columbia, and issues the license hereinafter mentioned. None of the defendants is a citizen of the Commonwealth of Pennsylvania.

4. Plaintiff is the holder of a motor fuel importer's license of the District of Columbia which expires June 30, 1957.

5. Plaintiff has duly filed with the defendants an application for the renewal of said license for the annual period commencing July 1, 1957 and has duly tendered the fee, and stands ready to furnish the surety bond, required of applicants for such license, and hereby renews and continues the tender of same.

6. Defendants rejected on June 13, 1957 and denied plaintiff's application for such license on the ground that plaintiff has not set forth in its application therefor the name of its "resident general agent" in the District of Columbia.

7. Plaintiff does not have and has at no time had, a resident general agent in the District of Columbia, but has, and so stated in its aforementioned application, an agent to receive service of process in the District of Columbia.

8. There is no requirement of law that a foreign corporation seeking a motor fuel importer's license have a resident general agent in the District, or that a foreign corporation not having such an agent appoint or name one in the application for a motor fuel importer's license.

9. On information and belief, plaintiff alleges that the application aforementioned entitled plaintiff to the issuance of a motor fuel importer's license and that the failure and refusal of the defendants to issue same to plaintiff were arbitrary, capricious and unlawful.

10. Plaintiff has a substantial number of service station dealers and consumer customers to whom it supplies and keeps supplied with motor fuel in the District of Columbia and the plaintiff and its customers in the District of Columbia will suffer immediate, great and irreparable injury and damages if plaintiff is interfered with or interrupted in the importation and distribution of motor fuel in the District of Columbia and its said motor fuel importer's license is not renewed and is refused or denied renewal.

11. Plaintiff alleges that it is entitled to the intervention of this Court, temporarily restraining and enjoining the defendants, and every one of them, from restricting or interfering with plaintiff in the importation and distribution of motor fuel in the District of Columbia until the hearing and determination of this action, and plaintiff alleges it is entitled also to the intervention of this Court to require by its mandatory order that the defendants renew plaintiff's motor fuel importer's license for the annual period beginning July 1, 1957 and to adjudge and declare that plaintiff is so entitled to such renewal, upon payment of the statutory fee and posting of the required surety bond, which plaintiff tenders and offers to pay and post, plaintiff having filed the application for renewal of such license in due and legal form.

WHEREFORE, the premises considered, plaintiff demands judgment:

1. That the defendants be enjoined and restrained *pendente lite* and permanently from in any wise restricting or interfering with the plaintiff in the importation and distribution of motor fuel in the District of Columbia after June 30, 1957.

2. That the defendants be required by mandatory order of this Court to renew or to issue to the plaintiff a District of Columbia motor fuel importer's license for the annual period commencing July 1, 1957, upon payment by the plaintiff of the statutory fee therefor and the deposit by plaintiff with defendants of the usual surety bond required of motor fuel importers.

3. That this Court adjudge and declare the plaintiff to be entitled to a renewal of its aforesaid motor fuel importer's license for the annual period commencing July 1, 1957, upon compliance by plaintiff with the statutory fee and surety bond requirements above mentioned.

4. For such other and further relief as may be just and proper or as the case may require.

ELLIS, HOUGHTON & ELLIS

By KAHL K. SPRIGGS
Kahl K. Spriggs
504 Southern Building
Washington 5, D. C.
Attorneys for Plaintiff

VERIFICATION (omitted in printing)

Filed December 18, 1958

Answer of Defendants Robert E. McLaughlin, David B. Karrick, Members of the Board of Commissioners of the District of Columbia, and Kenneth Back

First Defense

The complaint fails to state a claim against the defendants upon which relief can be granted.

Second Defense

1. The defendants neither admit nor deny the jurisdictional allegations contained in paragraph numbered 1 of the complaint and say that jurisdiction is a question which must be decided by the Court.

2. On information and belief, the defendants admit the allegations contained in paragraph numbered 2 of the complaint.

3. The defendants Robert E. McLaughlin, and David B. Karrick admit that they are members of the Board of Commissioners for the District of Columbia, but deny that defendant Thomas A. Lane occupies a position as a member of that Board. However, defendants McLaughlin and Karrick, admit that at the time the complaint herein

was filed that Thomas A. Lane was Engineer Commissioner for the District of Columbia and a member of the Board of Commissioners, D. C. The remaining allegations contained in paragraph numbered 3 of the complaint are admitted.

4. The defendants admit that the allegations contained in paragraph numbered 4 of the complaint were factually correct at the time the subject complaint was filed.

5. The defendants are without knowledge or information sufficient to form a belief as to the allegations contained in paragraph numbered 5 relating to the tendering of the fee and furnishing of a surety bond and deny each and every remaining allegation contained in said paragraph.

6. The allegations contained in paragraph numbered 6 of the complaint are admitted.

7. The defendants, on information and belief, deny the allegations contained in paragraph numbered 7 of the complaint.

8 & 9. The defendants deny the allegations contained in paragraphs numbered 8 and 9 of the complaint.

10. On information and belief the defendants admit the allegations contained in the first three lines of paragraph 10 of the complaint. These defendants say that the remaining allegations in said paragraph are mere conclusions of the pleader to which they should not be required to give answer. However, if answer be required, said remaining allegations are denied.

11. The defendants deny the allegations contained in paragraph numbered 11 of the complaint. However, the defendants say that by virtue of a directive of the United States Court of Appeals for the District of Columbia Circuit, this Court entered an order for preliminary injunction such as that described in paragraph numbered 11.

Further answering the complaint, the defendants deny all allegations not specifically admitted or otherwise answered.

/s/ CHESTER H. GRAY
Chester H. Gray
Corporation Counsel, D. C.

/s/ GEORGE C. UPDEGRAFF
George C. Updegraff
Assistant Corporation Counsel, D. C.

/s/ JOHN A. EARNEST
Assistant Corporation Counsel, D. C.
Attorneys for Defendants
District Building
Washington 4, D. C.

Filed June 26, 1957

EXHIBIT A

May 9, 1957

Cities Service Oil Company
Tax Department
70 Pine Street
New York 5, N. Y.

Gentlemen:

Your motor-vehicle fuel importer license and bond expire on June 30, 1957.

An application for license, accompanied by a check for $5.00 payable to the Collector of Taxes, D. C. and bond for the period July 1, 1957—June 30, 1958, should be filed in this office not later than June 15, 1957. The bond should be in the amount of $20,000.00.

The application shall be signed and sworn to by the owner of such business, if owned by an individual; by the

partners, if owned by a partnership; or by the president and secretary of the corporation, or by its manager or resident general agent, if owned by a corporation. The Corporation Counsel's Office will not approve applications and bonds unless the instructions in this paragraph are observed.

The appropriate designation (individual, partnership or corporation) must be shown after the name of the company wherever it appears on the enclosed forms.

A foreign corporation *must* report a bona fide resident general agent in the District of Columbia. *A registered agent for the service of process only is not a resident general agent.*

Please file the application and bond not later than June 15, 1957.

As requested heretofore, all applications and reports should be sent by *REGISTERED MAIL* and addressed to "Board of Personal Tax Appraisers, Room 2121, Municipal Center, Washington 1, D. C."

Very truly yours,

Board of Personal Tax Appraisers
(Mrs.) Juliette L. Furr
Chief Clerk

Encls
JCA/gk

Filed June 26, 1957

EXHIBIT B

June 6, 1957

Cities Service Oil Company
Tax Department
70 Pine Street
New York 5, N. Y.

Gentlemen:

Your application for a license as a motor fuel importer in the District of Columbia is returned for the reasons outlined below—

Section 47-1903 (D.C. Code) reads in part, as follows: * * * and, if a foreign corporation, the name of its resident general agent * * *

Question 12 requesting name of the resident general agent shows—

NONE—Limited Agent—United States Corporation Co., 1111 National Press Building, Washington, D. C.

It will be necessary to show the name and address of a resident general agent authorized to transact any business in the District of Columbia before a license can be issued.

49—Not answered.

The application is signed by the Manager, Tax Department instead of the President and Secretary in accordance with printed instructions on the form and paragraph 3 of our letter of May 9, 1957.

In order for anyone else to sign the application the corporation must furnish a certified copy of the by-laws or the resolution of the Board of Directors authorizing such person to sign contracts on behalf of the corporation. This

document must be imprinted with the corporation's seal and be notarized.

Very truly yours,

Board of Personal Tax Appraisers
(Mrs.) JULIETTE L. FURR
Chief Clerk

Encl.
JLF/gk

Filed June 26, 1957

EXHIBIT C

June 11, 1957

Cities Service Oil Company
Tax Department
70 Pine Street
New York 5, N. Y.

Gentlemen:

Please refer to our letter of June 6, 1957 returning application for a license as a motor fuel importer.

In this letter we have requested you to show the name and address of a resident general agent authorized to transact any business for the Company in the District of Columbia before a license can be issued.

Your attention is also called to Act 26 of the Police Regulations, Sec. 2, which reads as follows:

> "Every licensed importer shall designate a local representative and maintain a local office or place of business within the District of Columbia, and every change of address shall be reported within 10 days of such change to the Assessor of the District of Columbia."

When furnishing the information asked for in our letter of June 6, 1957 the information requested in Sec. 2 should also be furnished.

Very truly yours,

Board of Personal Tax Appraisers
(Mrs.) JULIETTE L. FURR
Chief Clerk

JLF/gk

Filed June 26, 1957

EXHIBIT D

June 13, 1957

Cities Service Oil Company
Tax Department
70 Pine Street
New York 5, N. Y.

Gentlemen:

Mr. Thomas H. Cahir, Division Manager, has submitted for review your application for license as Motor Fuel Importer District of Columbia.

The application is rejected for the following reasons previously outlined in our letter of June 6, 1957 and June 11, 1957.

Section 47-1903 (D.C. Code) reads in part, as follows: * * * and, if a foreign corporation, the name of its resident general agent * * *

Question 12 requesting name of the resident general agent shows—

None—Limited Agent—United States Corporation Co., 1111 National Press Building, Washington, D. C.

It will be necessary to show the name and address of a resident general agent authorized to transact any business in the District of Columbia before a license can be issued.

The application is signed by the Assistant Secretary instead of the Secretary in accordance with printed instructions on the form and paragraph 3 of our letter of May 9, 1957.

In order for anyone else to sign the application the corporation must furnish a certified copy of the by-laws of the resolution of the Board of Directors authorizing such person to sign contracts on behalf of the corporation. This document must be imprinted with the corporation's seal and be notarized.

Your attention is also called to Art. 26 of the Police Regulations, Sec. 2, which reads as follows:

> "Every licensed importer shall designate a local representative and maintain a local office or place of business within the District of Columbia, and every change of address shall be reported within 10 days of such change to the Assessor of the District of Columbia."

Please complete and return as soon as possible.

Very truly yours,

Board of Personal Tax Appraisers
(Mrs.) Juliette L. Furr
Chief Clerk

JLF:rh

Filed June 26, 1957

EXHIBIT E

GOVERNMENT OF THE DISTRICT OF COLUMBIA

EXECUTIVE OFFICE

WASHINGTON 5, D. C.

June 25, 1957

I hereby certify that the following is a true and correct copy of Article 26 of the Police Regulations for the District of Columbia in effect on December 2, 1942:

ARTICLE 26
MOTOR VEHICLE FUEL TAX

Section 1. Every licensed importer of motor vehicle fuel into the District of Columbia shall keep permanent books showing purchases, transfers, sales, or other dispositions, and uses of motor vehicle fuel, including bookkeeping record of daily opening and closing inventories of motor vehicle fuel subject to the provisions of the Act of April 23, 1924 (43 Stat. 106), as amended. All such bookkeeping records of purchases shall be supported by invoices or other shipping data, and all sales, transfers, or other dispositions, shall be supported by delivery tickets and a monthly record by customers, except in cases of retail sales. All accounting records shall be maintained in such a way as to be readily reconciled with the monthly return filed with the Assessor. Such books and other accounting records shall be available for audit and inspection by the office of the Assessor of the District of Columbia at usual business hours.

Sec. 2. Every licensed importer shall designate a local representative and maintain a local office or place of business within the District of Columbia, and every change of address shall be reported within 10 days of such change to the Assessor of the District of Columbia.

Sec. 3. Where motor vehicle fuel is resold or transferred by the licensed importer into other jurisdictions, official copies of delivery tickets or sales invoices shall be kept in the local office. Records of sales directly to an

agency of the U. S. Government or District of Columbia Government shall be maintained by the local office. Exemption certificates furnished retailer at the time of sale, when properly executed shall be accepted by the importer and be attached to its monthly returns to the Assessor.

Sec. 4. Effective January 1, 1943 and thereafter, a permanent record shall be maintained for one year by the retailer of daily gross purchases, gross sales, and book-keeping inventory. All records of the retailers shall be subject to inspection during usual business hours of the day by the Assessor or his representatives.

Sec. 5. Every tank wagon, truck trailer, or motor vehicle bearing or containing motor vehicle fuel, kerosene, motor oil, or other petroleum products, for delivery in or through the District of Columbia, shall, have printed or painted thereon, in letters not less than 4 inches high, in a conspicuous place on the sides of each such tank wagon, truck, trailer, or vehicle, the name and address of the owner or owners of said vehicle or vehicles.

Sec. 6. Every operator or other person in charge of every such tank wagon, truck, trailer, or vehicle shall have in his possession at the time of delivery or deliveries a true legible invoice or ticket showing in liquid measure the gallonage of each such motor fuel, kerosene, motor oil, or other petroleum product, together with the name and address of the owner of such motor fuel, kerosene, motor oil, or other petroleum product.

Sec. 7. Upon demand of any member of the Metropolitan Police Force, the Assessor of the District of Columbia or his representatives, on the person in charge of any such tank wagon, trailer, truck or other vehicle, or the operator or driver thereof, he shall exhibit the invoice or ticket herein required, for inspection.

Sec. 8. Any importer or distributor, retail dealer, individual, firm, partnership, corporation or association violating any of the provisions of these regulations shall, upon conviction thereof, be punished by a fine of not more than $300.00.

Sec. 9. These regulations shall become effective December 2, 1942, except as provided in Section 4.

Illegible Signature
Secretary,
Board of Commissioners, D. C.

Plaintiff's Exhibit 1*

Filed July 1, 1957

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ASSESSOR
WASHINGTON, D.C.

APPLICATION FOR LICENSE AS MOTOR FUEL IMPORTER DISTRICT OF COLUMBIA

DISTRICT OF COLUMBIA, *ss:*

1. I (We), Cities Service Oil Company, a dealer of motor fuel, hereby make application for a license as MOTOR FUEL IMPORTER for the places of business shown herein, and aver that the answers made herein are true and correct.

2. Name: Cities Service Oil Company.

3. Address: 60 Wall Street, New York, New York.

4. State if corporation, partnership, or individual: Corporation.

5. Name under which applicant intends to transact business: Cities Service Oil Company 60 Wall Street, New York 5, New York.

6. If partnership, give names and addresses of each person constituting same.

7. If corporation, give the names, titles and addresses of the officers and directors. See attached list.

8. If corporation, give the name and address of the officer charged with the duty of filing motor fuel tax reports: James W. Fry, 60 Wall Street, New York 5, New York.

---

* This exhibit is the same as Plaintiff's Exhibit No. 1 referred to in docket entry of September 29, 1960.

9. Under the laws of what State was corporation chartered? Pennsylvania.

10. Date of incorporation: September 15, 1916.

11. Date business was established: September 15, 1916.

12. If foreign corporation, name and address of resident general agent in District of Columbia: NONE. Limited Agent: United States Corporation Co.; 1111 National Press Bldg., Washington, D. C.

13. What do you estimate will be your monthly distribution of sales of taxable motor fuel? 375,000 gallons.

14. Are you distributing trade-marked motor fuel of another oil company or distributor? No.

15. If so, give name of company or distributor from whom you purchase motor fuel.

16. From what point or points are shipments received? Lake Charles, La.; Fairfield, Md.

17. List on back of this application locations of all self-owned or self-operated bulk plants and terminals in District of Columbia.

18. List on back all self-owned and self-operated service stations in District of Columbia.

19. If no storage maintained in District of Columbia, furnish list of District of Columbia customers with addresses on separate sheet, and on back state "No storage maintained in District of Columbia."

The list of self-owned or self-operated terminals, bulk plants and service stations shown on back of this form is a true and accurate statement of all properties owned and operated, or operated for our account, in the District of Columbia.

Cities Service Oil Company
By E. L. STAUFFACHER
President
Authorized Representative

Attest:
G. B. LYON
Assistant Secretary

This application shall be signed and sworn to by the owner of such business, if owned by an individual; by the partner, if owned by a partnership; or by the president and secretary of the corporation, or by its manager or resident general agent if owned by a corporation.

AFFIDAVIT

On this 12th day of June, 1957, before me, a notary public, personally appeared the above-named importer or authorized representative known to me, who makes oath in due form of law that the matters and things set forth in the application are true as therein set forth to the best of his knowledge and belief.

Witness my hand ANNE M. PINZ
Notary Public

My commission expires 3/30/58

May 31, 1957

CITIES SERVICE OIL COMPANY

A Pensylvania corporation—
incorporated September 15, 1916
List of Officers and Directors

Officers elected at Organization meeting—February 4, 1957

Chairman of the Board	W. A. Jones	60 Wall St., N. Y. 5, N. Y.
President	E. L. Stauffacher	60 Wall St., N. Y. 5, N. Y.
General Manager	E. L. Stauffacher	60 Wall St., N. Y. 5, N. Y.
Vice President	J. A. Kelley	60 Wall St., N. Y. 5, N. Y.
Vice President	T. F. McGarey	60 Wall St., N. Y. 5, N. Y.
Vice President	E. G. Maddock	60 Wall St., N. Y. 5, N. Y.
Vice President	E. W. Lane	60 Wall St., N. Y. 5, N. Y.
Vice President	E. H. Wellemeyer	60 Wall St., N. Y. 5, N. Y.
Treasurer	R. A. Cuthbertson	60 Wall St., N. Y. 5, N. Y.
Secretary	James W. Fry	60 Wall St., N. Y. 5, N. Y.
Asst. Secretary	R. A. Herrod	St. Rose, La.
Asst. Secretary	C. O. Johnson	60 Wall St., N. Y. 5, N. Y.
Asst. Secretary	G. B. Lyon	60 Wall St., N. Y. 5, N. Y.
Asst. Secretary	C. B. Wedum	60 Wall St., N. Y. 5, N. Y.
Asst. Secretary	Childrey Scott	Richmond, Va.
Asst. Treasurer	G. F. Walter	60 Wall St., N. Y. 5, N. Y.
Asst. Treasurer	H. R. Cory	60 Wall St., N. Y. 5, N. Y.
Auditor	J. H. Diercks	60 Wall St., N. Y. 5, N. Y.

All terms expire at Directors' meeting following Stockholders' meeting.

Directors elected at Stockholder's meeting N. Y.—January 28, 1957

R. A. Culbertson	60 Wall St., N. Y.	N. Y.
G. H. Hill, Jr.	60 Wall St., N. Y.	N. Y.
W. A. Jones	60 Wall St., N. Y.	N. Y.
J. A. Kelley	60 Wall St., N. Y.	N. Y.
E. W. Lang	60 Wall St., N. Y.	N. Y.
E. G. Maddock	60 Wall St., N. Y.	N. Y.
T. F. McGrey	60 Wall St., N. Y.	N. Y.
H. L. O'Brien	60 Wall St., N. Y.	N. Y.
E. L. Stauffacher	60 Wall St., N. Y.	N. Y.
B. S. Watson	60 Wall St., N. Y.	N. Y.
E. H. Wellemeyer	60 Wall St., N. Y.	N. Y.

All terms, expire January 27, 1958

DISTRICT OF COLUMBIA CUSTOMERS

Combustioner Corporation
409 Tenth Street, S. W.
Washington, D. C.

Alfred W. Conrad
10th & Maryland Ave., S. W.
Washington, D. C.

Greene & Dyer, Inc.
300 Hamilton St., N. E.
Washington, D. C.

W. T. Newman
5001 Georgia Ave., N. W.
Washington, D. C.

Griffith Consumers
1300 First St., N. E.
Washington, D. C.

M. I. O. Boyle & Sons
817 Michigan Ave., N. E.
Washington, D. C.

Holy Name College
16th and Taylor Sts., N. E.
Washington, D. C.

Elliot Motor Lines
2130 24th Place, N. E.
Washington, D. C.

Marist College
3901 Harewood Rd., N. E.
Washington, D. C.

E. C. Greene
4515 MacArthur Blvd., N. W.
Washington, D. C.

Irvin Moore
901 Florida Ave., N. W.
Washington, D. C.

Hessick, Inc.
14th and Maine Sts., S. W.
Washington, D. C.

Regal Cleaners & Dyers
635 Main Ave., S. W.
Washington, D. C.

H. B. Deary Jr. & Bros.
1625 You St., N. W.
Washington, D. C.

William Rosson
1311 Savannah St., S. E.
Washington, D. C.

Merchants Transfer and Storage
920 'E' St., N. W.
Washington, D. C.

Shayne Bros., Inc.
1341 Half St., S. E.
Washington, D. C.

Charles H. Wald
Rhode Island & Newton
Ave., N. E.
Washington, D. C.

The Brooklyn Co.
9th & Michigan Ave., N. E.
Washington, D. C.

Simpson Bros., Inc.
D/B/A Wakefield Dairy
41 'L' St., S. E.
Washington, D. C.

Edward B. Booth
2831 'M' St., N. W.
Washington, D. C.

Roy Calvert
1201 Bladensburg Rd., N. E.
Washington, D. C.

William B. Crouch
4326 Wisconsin Ave., N. W.
Washington, D. C.

Ernest Obenland
7730 Georgia Ave., N. W.
Washington, D. C.

Sears & Roebuck & Co.
911 Bladensburg Rd.
Washington, D. C.

Andrew Sirica & Herman Wand
D/B/A Tan Top Cab Co., Inc.
1731 Kalorama Rd., N. W.
Washington, D. C.

Norton & Co.
339 'L' St., S. W.
Washington, D. C.

Sam Rodis
65 'H' St., N. W.
Washington, D. C.

Sanitary Carpet Cleaning Co.,
Inc.
6207 Blair Rd., N. W.
Washington, D. C.

Charles Cumberland
5340 Wisconsin Ave., N. W.
Washington, D. C.

District Waste Materials Co.,
Inc.
2115 Bryant Street, N. E.
Washington, D. C.

Stack & D. Mann
D/B/A Capitol Automotive
Center Inc.
2125 'M' St., N. W.
Washington, D. C.

District Metals Co., Inc.
4601 Upshur St.
Bladensburg, Md.

Delivered into Washington, D. C.

Plaintiff's Exhibit 2

Filed July 1, 1957

CITIES SERVICE OIL COMPANY

(Pennsylvania)

CERTIFIED COPY OF SECTION 6 OF ARTICLE IV

OFFICERS OF BY-LAWS OF SAID CORPORATION

"ARTICLE IV. Section 6. The secretary shall be sworn to the faithful discharge of his duties and shall attend all meetings of the board of directors and stockholders and shall record the minutes of such meetings in books provided for that purpose. He shall attend to the giving and serving of all notices of the corporation, together with such lists of the stockholders as may be required by law. He shall be the custodian of all papers brought before the board for action or ordered on file; also of all written contracts, deeds, insurance policies, leases, records and evidences of title to real estate and other property (except moneyed securities) owned, held or controlled by the company. He shall have the custody of the corporate seal, and shall affix and attest the same when authorized by the chairman of the board, president, a vice-president, the board of directors or a committee thereof. The board of directors or executive committee may appoint one or more assistant secretaries who shall have such powers and perform such duties as the board or executive committee may direct, and shall perform all the duties of the secretary in his absence."

I, C. O. Johnson, Assistant Secretary of CITIES SERVICE OIL COMPANY, a Pennsylvania corporation, do hereby certify that the above and foregoing is a true and correct copy of Section 6 of Article IV—Officers—of said corporation.

C. O. JOHNSON

I, C. O. Johnson, Assistant Secretary of Cities Service Oil Company, do hereby certify that G. B. Lyon has been duly elected to and now holds the office of Assistant Secretary.

C. O. Johnson

Dated: June 13, 1957.

(Filed June 14, 1960)

Motion by Plaintiff for Summary Judgment

Plaintiff, Cities Service Oil Company, a corporation, moves for summary judgment in its favor as follows:

1. Permanently enjoining and restraining the defendants herein, the Board of Commissioners of the District of Columbia, being Robert E. McLaughlin, David Karrick, and Alvin C. Welling (who is now Engineer Commissioner) and Kenneth Back, Assessor for the District of Columbia, from restricting or interfering with plaintiff in the importations and deliveries of motor fuel in the District of Columbia because it does not have a "resident general agent" as such is termed in the Motor Fuel Tax Law of the District of Columbia, Section 47-1901 et seq., of the District of Columbia Code, 1951 edition.

2. Adjudging and declaring that Section 47-1903, District of Columbia Code, 1951 edition, a portion of the said Motor Fuel Tax Law, does not require plaintiff to maintain a resident general agent in the District of Columbia as a condition of obtaining a license under such Act or Law.

3. Adjudging and declaring that if such statute is construed to impose the aforesaid condition of maintaining a resident general agent in the District as a prerequisite to obtaining such license, such statute is void, unenforceable and unconstitutional because such requirement would be arbitrary, unreasonable, capricious and unre-

lated to the purposes and requirements of licensing motor fuel distributors and collecting motor fuel tax therefrom.

4. Adjudging and declaring that defendants' interpretation and application of the Motor Fuel Tax Law is discriminatory and therefore unconstitutional.

5. Adjudging and declaring such other relief as plaintiff may be entitled to herein.

For grounds of this motion, plaintiff refers to the matters of record herein, including the deposition of John C. Ahearn, the affidavit of Kenneth C. Littlefield annexed hereto, and the attached Points and Authorities in support of plaintiff's motion for summary judgment.

There is no genuine dispute or issue as to any material fact and plaintiff is entitled to summary judgment as aforesaid.

KARL K. SPRIGGS
504 Southern Building
Washington 5, D. C.
Attorney for Plaintiff

Of Counsel:
GEORGE H. COLAX
EDWIN J. GORDON
60 Wall Street
New York 5, New York

(Filed June 14, 1960)

Affidavit in Support of Plaintiff's Motion for Summary Judgment

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Kenneth C. Littlefield, being duly sworn, deposes and says:

1. I am the Tax Manager of the Cities Service Oil Company, the above-named plaintiff, and I make this affidavit in support of plaintiff's motion for summary judgment. I have personal knowledge of the matters hereinbefore referred to. It is my belief that there is no triable issue of fact and no defense to plaintiff's cause of action, and that the defenses asserted in defendants' answer have no merit.

2. This suit was instituted to prevent the defendants from restricting or interfering with the plaintiff in the distribution and importation of motor fuel subsequent to June 30, 1957; to demand judgment that the court order the defendants to renew plaintiff's motor fuel importer's license upon payment of the fee and filing of a surety bond; and for a declaratory judgment that plaintiff is not required to maintain a resident general agent in the District of Columbia under Section 47-1903, D. C. Code 1951.

3. The defendants, who are the assessor, commissioner, and the Board of Commissioners of the District of Columbia charged with the responsibility for administration of the aforesaid Act, contend that the aforementioned section requires a foreign corporation to have a resident general agent in the District as a condition of obtaining a motor fuel importer's license. The argument rests upon that part of the Section which states that "Application for an importer's license shall also contain * * * if a foreign corporation, the name of its resident general agent * * *".

4. It is the contention of plaintiff that the quoted portion of the section requires that the foreign corporation

need name a resident general agent in the license application if it has one, or, if an agent is required to be named in the application, that the agent indicated is one for the service of process only.

5. The Motor Fuel Tax Law imposes no requirement that a foreign corporation name or maintain a resident general agent in the District of Columbia. The Act merely states in Section 47-1903 that, with respect to the filing of the application for an importer's license, if the applicant be a foreign corporation it shall name on the application form its resident general agent. No other section of the Act refers to or places any duty upon the resident general agent, nor is the term explained in Section 47-1902, which is the definitions section of the Act.

Neither a domestic corporation, partnership or proprietorship nor a non-resident partnership or proprietorship is required to name in the application form its resident general agent as a prerequisite to obtaining an importer's license. As to those entities, the application only calls for the name and place of business of the local representative. The Statute if construed in accordance with defendants' interpretation would discriminate against a foreign corporation such as the plaintiff.

The discrimination in forcing a foreign corporation to name and maintain a resident general agent in the District while the other entities seeking a license need only name and maintain a local representative is apparent. It is obvious that the power and responsibility of a local representative is inherently less than that of a resident general agent, and undoubtedly implies merely an agent for the service of process.

6. The plaintiff held a motor fuel importer's license in the District of Columbia continuously from 1938 to June 31, 1957. During this period it fully paid and discharged all tax liability to the District of Columbia in connection there-

with and fully complied with all requirements of the Motor Fuel Tax Law.

7. On June 13, 1957 the defendants rejected plaintiff's application for a renewal of its motor fuel importer's license solely on the ground that plaintiff did not set forth in its application therefor the name of its resident general agent in the District of Columbia. Subsequent to that time, plaintiff has made repeated attempts to secure a motor fuel importer's license, but in each instance such request has been refused because of its failure to name a resident general agent.

8. Plaintiff does not have, nor has it had for the past twenty years, a resident general agent in the District of Columbia. For approximately fifteen years of this time, the plaintiff designated itself in response to the question on the application for the license to name its resident general agent. Obviously a foreign corporation not maintaining an office in the District cannot be its own resident general agent. Since that time it has had and continues to have a limited agent to receive service of process in the District of Columbia.

In its response to the question on the application for a motor fuel importer's license to name its resident general agent, the plaintiff stated:

"NONE. Limited Agent, United States Corporation Co., 1111 National Press Bldg., Washington, D. C."

9. The requirement that a foreign corporation name a resident general agent in the application for an importer's license bears no reasonable relation to the administration of the Act. There is a necessity in such an application that the motor fuel importer designate an agent upon whom service of process can be issued. This requirement has been satisfied by the plaintiff's designation of its limited agent for service of process.

10. The application for a license as a motor fuel importer seeks to accomplish three purposes—first, to identify the distributors who are within the purview of the law; second, to assure that the tax is paid; and third, to be certain that the amount of taxes paid by the importer is correct.

The identification of the distributors is established in the application for license. The assurance that any liability for unpaid taxes will be paid is satisfied by the filing of surety bonds. Verification as to the accuracy of the taxes paid is accomplished by auditing procedures. None of these functions require the office of the resident general agent. To support this contention, the plaintiff adverts to the construction that has been applied to the Statute by the defendants who are charged with the administration of the Motor Fuel Tax Law. Defendants' interpretation of the Law supports plaintiff's position that the requirement in the application that a foreign corporation name a resident general agent is a meaningless one and that the most the section requires is the naming of a limited agent for the service of process.

Certainly if the defendants intended that the designated resident general agent have any of the functions described above or any other function or power beyond that of acting as agent for service of process, they would have utilized the resident general agent in their dealings with the licensees. The defendants have not done this, but rather have ignored the resident general agent and have dealt exclusively with the officers and employees of the licensee outside the District.

11. Pretrial examination of the defendants disclosed that no license application for a motor fuel importer's license, made by foreign corporations for the years 1953 through 1958, was signed by a person designated as a resident general agent. This was confirmed in a letter dated February 4, 1956 from John A. Earnest, attorney for defendants, to Kahl K. Spriggs, one of plaintiff's attorneys in this action.

In response to Mr. Spriggs' inquiry as to whether the persons who signed the applications for motor fuel importer's licenses were also officers of the foreign corporations, Mr. Earnest said: "In that connection, please be advised that for the license years 1953 through 1958, no application for a motor fuel importer's license was signed by a person acting as resident general agent".

12. Pretrial discovery of the defendants disclosed that the monthly tax returns filed by the licensees were neither signed nor was payment made by the resident general agent, but rather in every instance the return was signed by an officer of the company and payment was made from the licensee's office.

13. It was also disclosed during pretrial examination that surety bonds were in all cases signed not by the resident general agent, but rather by an officer of the foreign corporation.

14. Examination of the defendants elicited the fact that defendants in their audits of the licensees conducted such audits in most instances outside the District and in no case through the office of the resident general agent. When the defendants traveled outside the District to audit the licensees' books, it was at their own expense. The auditors not only went to surrounding cities but traveled to Philadelphia and New York City in the cases of Gulf Oil Co., Sinclair Refining Co., and Harbor Petroleum Corporation to confirm the accuracy of the tax payments. Certainly, if the defendants thought that the resident general agent had any function or authority beyond that of acting merely as agent for service of process, it would have conducted such audits through the resident general agent's office rather than traveling to locations outside of the District of Columbia.

15. Pretrial examinations disclosed that the most defendants can allege with respect to dealing with the resident general agent for the years 1953 through 1958 is

that, in one instance in those years, the deponent vaguely remembers that he might have had a conversation with the resident general agent of one of the licensees rather than with officers or employees of the licensees. Aside from that one experience, every conversation, communication or negotiation was had not with the resident general agent but with the officers or employees of the licensee outside the District. This clear disregard for the so-called resident general agent patently establishes that defendants never considered the resident general agent designated in the license application as having any powers beyond that as acting as a limited agent for service of process. The requirement and the office have become meaningless. If the defendants thought the so-called resident general agent had function or authority, it would have been more convenient for the defendants to act through the agent's office in the District rather than dealing with the officers or employees of the licensees outside the District.

16. This conduct by the defendants, in acting through the officers and employees of the foreign corporation rather than through the resident general agent, clearly indicates that the requirement that a foreign corporation designate a resident general agent in the application form is not a mandatory one, but rather is required only if the foreign corporation has a resident general agent; if it does not, a limited agent for process is sufficient. Since the Act makes no mention of the powers or duties of the resident general agent but merely states that a foreign corporation name a "resident general agent" in the application blank, and since the defendants have not desired to provide the resident general agent with any function, then plaintiff should not be forced to maintain such an agent within the District. It is evident that no function in administering the Motor Fuel Tax Law requires the office of a resident general agent, and to force a foreign corporation to name and maintain such an office

is arbitrary, capricious and unrelated to the administration of the Act and so construed the statute would be invalid and unconstitutional.

The limited agent appointed by the plaintiff satisfies the administrative interpretation of the Act that the licensee have an agent within the District upon whom service of process could be made.

17. Pretrial disclosures have also shown that the defendants in their administration of the Motor Fuel Tax Law have further discriminated against the plaintiff, in that they have licensed other foreign corporations as motor fuel importers which have named as their resident general agents corporations which merely act as limited agents to accept service of process. The following is a list indicating the resident general agents designated by certain foreign coporations which were granted licenses during the indicated periods:

Date	Licensee	Designated Resident General Agent
1953 thru 1958	The American Oil Co.	Prentiss-Hall Corporation Systems, Inc.
1953 thru 1958	Atlantic Refining Co.	Milton E. Hartley, c/o Corporation Trust Co.
1953 thru 1958	Crown Central Petroleum Corporation	Milton E. Hartley, c/o Corporation Trust Co.
1956 and 1957	Diamond Service Co.	Corporation Guaranty and Trust Co.
1956 and 1957	Esso Standard Oil Co.	C.T. Corporation System
1953 thru 1957	Homes Oil Co.	No. Designee
1957	Mid-Atlantic Petroleum Corporation	C.T. Corporation System
1954 and 1955	Patuxent Oil Co.	Milton E. Hartley, c/o Corporation Trust Co.

Date	Licensee	Designated Resident General Agent
1956	Patuxent Oil Co.	Corporation Trust Co.
1957	Patuxent Oil Co.	C.T. Corporation System
1953 thru 1957	Richfield Oil Co.	Milton E. Hartley, c/o Corporation Trust Co.
1953 thru 1957	Shell Oil Co.	Milton E. Hartley, c/o Corporation Trust Co.
1956 and 1957	Sinclair Refining Co.	C.T. Corporation System
1953 thru 1955	Socony Vacuum Oil Co.	Corporation Trust Co.
1956 and 1957	Socony Mobil Oil Co.	C.T. Corporation System
1953 thru 1956	Spur Distributing Co.	Milton E. Hartley, c/o Corporation Trust Co.
1957 and 1958	Spur Distributing Co.	C.T. Corporation System
1958	The Texas Company	Prentiss-Hall Corporation Systems, Inc.
1953 thru 1957	Tide Water Associated Oil Co.	Corporation Trust Co.
1954 thru 1957	Max Waller Co., Inc.	Milton E. Hartley, c/o Corporation Trust Co.
1956 and 1957	Warren Petroleum Co.	C.T. Corporation System

The defendants' action in licensing foreign corporations as motor fuel importers which have named well-known corporations whose function is merely to serve as agents to receive service of process, while denying a license to the plaintiff which named United States Corporation Co. as its

corporate agent for service of process, is discriminatory, arbitrary and capricious.

18. The defendants sought to enforce the requirement of a resident general agent on foreign corporations, and on this plaintiff in particular, for the purpose of imposing upon them a taxable status under the District of Columbia Franchise Law, whereas such foreign corporations might otherwise enjoy exempt status under the provisions of Section 47-1551 C.24 (H)(2) of said law. This recent insistence of defendants that foreign corporations name a resident general agent arose in an effort to circumvent the Court of Appeals decision in *Cities Service Oil Company v. District of Columbia*, Docket (1958), 103 U.S. App. D.C. 332, 258 F. 2d 426, in defendants' desire to insure that every foreign corporation importing motor fuel in the District of Columbia pay a franchise tax. Since a franchis tax must be paid by any foreign corporation having an agent within the District (Section 47-1551 c (H), D.C. Code 1951), defendants refused to issue an importer's license to anyone not having such an agent in the District. It is obvious that the defendants are attempting to do indirectly what they could not do directly—that is, to impose a taxable status upon the plaintiff through their interpretation of the licensing section of the Motor Fuel Tax Law by forcing plaintiff to maintain a resident general agent within the District.

19. This is a case in which summary judgment should be granted. There is no question of fact in issue since all of the uncontroverted proof offered comes from pretrial examination of the defendants. This examination showed clearly that, in the years 1953 through 1958, the defendants disregarded the office of the resident general agent for every use that could have been made of the office, dealing instead, except in one possible instance, with the officers and employees of the licensees. This, coupled with the filing of the surety bonds, signing of the application forms

and signing of the tax returns by the officers of the licensees instead of by the resident general agent, and the auditing of the licensee's books outside the District, demonstrates that defendant's position, which would require the plaintiff to name and maintain a resident general agent as a prerequisite to the obtaining of an importer's license is arbitrary, unreasonable and discriminatory, and is unrelated to the administration of the Act. A trial of this action will produce no other proof than the evidence of the foregoing.

WHEREFORE I pray that plaintiff be granted summary judgment as sought herein.

KENNETH C. LITTLEFIELD,

Sworn to before me this
1st day of June, 1960.

ANNE M. CHRISTOPHER
Anne M. Christopher
Notary Public, State of New York
No. 41-5925000
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1962

(Filed June 14, 1960)

Excerpts from Points and Authorities in Support of Plaintiff's Motion for Summary Judgment

In the monthly tax returns required to be filed by the licensees, in the years 1953 through 1957 the tax returns were not signed and payment was not made by the resident general agent but rather payment was made and the returns signed by officers or employees from outside the District (Ahearn's deposition—supp. info.).

In a letter dated February 4, 1956 from John A. Earnest, counsel for defendants, to Kahl K. Spriggs, one of the counsel for plaintiff, in response to an inquiry concerning the

signature on the application form for an importer's license, Mr. Earnest stated that for the years 1953 through 1958, no application for a motor fuel importer's license was signed by a person acting as resident general agent.

Surety bonds were in all cases signed not by the resident general agent but by an officer of the licensee (Ahearn's deposition—supp. infor.).

Deposition of John C. Ahearn

1 Washington, D. C.,
Monday, November 24, 1958.

Deposition of JOHN C. AHEARN, called for examination by counsel for the Plaintiff, pursuant to notice, at Room 504, Southern Building, Washington, D. C., beginning at 10.30 o'clock a.m., before Kenneth K. Johnston, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

For the Plaintiff:
GEORGE H. COHN, ESQ.
(60 Wall Street, New York City)
KAHL K. SPRIGGS, ESQ.
(504 Southern Bldg., Washington, D. C.)

For the Defendants:
JOHN A. EARNEST, ESQ.
(Room 317, District Building, Washington, D. C.)

2 Whereupon—

John C. Ahearn,

called for examination by counsel for the Plaintiff, being first duly sworn, was examined and testified as follows:

Examination on behalf of Plaintiff

By Mr. Colin:

Q. Will you state your name, please? A. John C. Ahearn.

Q. Mr. Ahearn, you are employed by the District of Columbia? A. That is correct.

Q. In what capacity? A. I am now the Chief of the Property Tax Division, since December 12, 1957.

Q. Did you have anything to do with gasoline importer tax prior to February 1958? A. From about February 1955.

Q. What was your work in that connection? A. I was in charge of the auditing and issuing of licenses and so forth.

Q. Did you have any assignment in connection with gasoline importer tax prior to 1955? A. I did not, no, sir.

Q. Were you with the District of Columbia? A. wait a minute. Let me take that back. From 1950 to 1955

3 we issued the licenses, and beginning in February 1955 the audit function was transferred to us.

Q. When you say "we issued the licenses from 1950 to 1955," do you mean the department in which you were employed? A. That is correct.

Q. Can you tell me the names of the companies which held gasoline importer licenses for the year 1958? A. No, I would not do that.

Q. Do you mean you would have to consult the record of your department to answer that question? A. That would be right.

Q. Do you have with you any records which will enable you to answer the question? A. I don't have them with me, no, sir.

Q. Can you tell me the names of the companies that applied for licenses for the year 1958? A. There were about thirty of them and I could not possibly remember all of them.

Q. Do you have the applications here with you? A. I don't have any records with me at all, no sir.

Q. Neither for 1958 or for any prior year, is that correct? A. That is correct.

Q. Could you produce those records at some later date on this deposition for the purpose either of refreshing your recollection or marking them in evidence?

Mr. Earnest: That is the sort of question that the witness is not in a position to answer. You can specify, if you would like to, in the record right now what records you are referring to, and then after we have considered your request, we will give you an answer on it. As you well know, at this very moment there is a motion which has been filed to quash a subpoena duces tecum which you served on a party in this suit, the Defendant Back, asking for any and all records for the year 1948 through the current date.

Mr. Colin: Mr. Earnest, we do not want to make something difficult out of something that can be handled simply. All we want is to get this information, and if the witness says that there are about thirty companies and he cannot remember them, then we would take them year by year at the convenience of the witness.

By Mr. Colin:

Q. Tell me the names of as many companies as you can remember who hold the importer license for 1958. A. That is the period July 1, 1957 to June 30, 1958? Is that correct?

Q. That is all right. A. We will start out with the Cities Service, Shell—

Mr. Earnest: Does Cities Service have a license?

5 The Witness: I am talking about applications.

By Mr. Colin:

Q. Let us take licenses, and we will get to applications later. Let us take licenses issued. A. Shell, Esso-Standard, Lord Baltimore—

Q. Lord Baltimore? A. I don't know whether they file it that way or as American Oil Company, maybe. It could be either one.

Texaco or the Texas Company, I think is the way they report—

Mr. Earnest: To save time and record, we will furnish you with the names of all licensees who applied for and were issued a fuel importer's license for the fiscal year 1957.

Mr. Colin: That is fine, and we would be glad to have it.

Mr. Earnest: That way we can actually save time and save the record.

Mr. Colin: We are not wasting time because what I want to know, after you tell me about them, is what the applications for those licenses show. I think there we would require the applications. So if you would give me the names of the licensees and the applications, let us say starting with this license here, that would be fine.

Mr. Earnest: Just a minute. We will furnish

6 you with a list of the names of all fuel importers who were issued a license for the current year. Do you mean beginning with the past year?

Mr. Colin: 7/1/57 to June 30, 1958.

Mr. Earnest: The fiscal year which just ended?

Mr. Colin: Yes, sir.

Mr. Earnest: All right.

Mr. Colin: You will give us a list of the importers and the license applications, right?

Mr. Earnest: Your question is, will I furnish you with a copy of the application which was filed by each of these?

Mr. Colin: Yes.

Mr. Earnest: I will, if you will tell me what you want about it. Are you talking about Item 12 which says "Resident General Ag[illegible]t"?

Mr. Colin: That is what we have to see about. Off the record, Mr. Reporter.

(Discussion off the record.)

Mr. Colin: Back on the record.

Mr. Earnest: As I have stated off the record, the Defendants will also furnish the information contained in all applications for the 1957-1958 license year in connection with questions 8, 9 and 12 of the application, as well as the name of the person signing said application for each of the applicants.

Mr. Colin: Very good. That is entirely acceptable. May we go off the record again, Mr. Reporter?

(Discussion off the record.)

Mr. Colin: Back on the record.

Mr. Earnest, as I understand it, you are willing at this time to produce like data for the years 1953-1954, 1954-1955, 1955-1956 and 1956-1957. Is that agreeable?

Mr. Earnest: What we agree to is what is applicable to those four years, the three years prior to the date of the application for the license which was issued here and from that year?

Mr. Colin: Yes.

Mr. Earnest: Very well.

Mr. Colin: Thank you.

In respect to the bonds which were filed as an accompaniment of the licenses, Mr. Earnest, can we have made available the names of the parties executing the bond on behalf of each of the several licensees for the same periods?

Mr. Earnest: Off the record, Mr. Reporter, please.

(Discussion off the record.)

Mr. Earnest: Back on the record.

We will also furnish you the statement concerning the signatory to each bond issued to oil importers for the same four-year period, so as to identify the position occupied by said signatory.

Mr. Colin: All right.

Mr. Earnest: Off the record again.

(Discussion off the record.)

Mr. Colin: Back on the record.

By Mr. Colin:

Q. Dealing with the same years which have just been mentioned, Mr. Ahearn, who effected the audits of the several licensees? A. Who did what?

Q. Who effected the audits. A. I was responsible to see that they were done. Was that your question?

Q. Yes, sir. A. Does that answer it?

Q. That is a good beginning. How frequently is a licensee audited? A. We try to audit them every three years, I believe. We get behind sometimes. We only had one man, when it was transferred to our office, and at that time they were somewhat behind, but we have two men now, and what we want to do is to get them as close to a three-year audit as possible.

Q. You do not have an annual audit? A. I don't know whether we will be able to get that or not.

Q. When you audit at three-year intervals that is for the years intervening between the time of the last audit and the current audit? A. That is correct.

Q. Are you able to tell me now of your own knowledge where the audits are made for each particular licensee during the years which we have been talking about, that is from 1953-1954 through to 1957-1958? A. Are you asking me for each one of the thirty people?

Q. Yes. A. I would have to look at some record.

Q. Do you have a record which will show that? A. I can find out from the records where they were made.

Q. Then, as I understand it, on your audit or on some other record in your office, there is an indication as to the place where the audit was effected? A. Yes, sir.

Mr. Colin: Off the record, Mr. Reporter, please.

(Discussion off the record.)

Mr. Colin: Let us put that on the record.

Mr. Earnest: If it is just a general statement that audits are conducted elsewhere than in the confines of the District, that should not be too difficult to get.

Mr. Colin: Let us try to see whether we cannot obtain from you a statement where audits are conducted for each of the several companies. It may be that they are always conducted at the same place, so that you will only have to tell us where that place is for each of the several companies.

Mr. Earnest: We will attempt to do it that way.

By Mr. Colin:

Q. Mr. Ahearn, as I understand it, your auditors are named Tripiciano— A. Tripiciano.

Q. And who is the other one? A. Davis.

Q. It is a fact that we have been assuming in this colloquy, that many of the audits are made outside the District of Columbia? A. Is this on the record?

Q. Yes.

Mr. Earnest: We do not question that.

The Witness: That is correct.

By Mr. Colin:

Q. Are any audits made in the District that you know of? A. Yes, there are.

Q. Were these two men, Mr. Ahearn, the auditors for the years which we have talking about, that

is, Messrs. Davis and Tripiciano? A. I don't remember just when Tripiciano came in, but he came in after 1955.

Q. Was Davis the only auditor before that? A. When the function was transferred to my office, Mr. Davis was the only regular auditor. I think at times he might have had somebody helping him.

Q. The audits are based on tax returns filed by the licensee, are they not, Mr. Ahearn? A. That is correct.

Q. Are you able to tell me who prepared and who executed the tax returns filed by each of the licensees for the years we are talking about? A. No, I could not tell you that.

Mr. Colin: Off the record, Mr. Reporter, please.

(Discussion of the record.)

Mr. Earnest: I am not going to commit myself on that. I will check into whether or not the Defendants object to furnishing the name of the individual signing on behalf of each licensee the monthly tax returns required under the pertinent statute.

Mr. Colin: Or the party indicated to have prepared same.

Mr. Earnest, if it is disclosed by the return, would you also tell us who prepared same and the capacity of the signatory?

Mr. Earnest: The last request will be considered in the same light as the one concerning the names of the persons certifying the return.

By Mr. Colin:

Q. Mr. Ahearn, do your records indicate who, or from what place payment of taxes was transmitted to your office? A. No, I wouldn't say that they do.

Q. In other words, if the Shell Oil Company transmits payments to you from its New York office for the gasoline tax, your records will not show that the remittance originated from that place; is that correct? A. The only

assumption you could make there is that the return came from New York, since the check came from New York.

Q. That assumption being made by you for the reason that the return was accompanied by a check, as required by law? A. That is right.

Q. Did the return and the payments come into your office? A. They came in but we have had no reason to check in the past to see whether the check was
13 made out at a certain point or not. If the check came in and was for the amount of the tax return, we would make a bill and send it down to the Treasurer's Office.

Q. And the place from which the return was transmitted would be indicated or suggested by the corporate capacity of the signatory to that return? A. I would say so, yes.

Q. In almost all cases these returns and payments are mailed into your office, are they not? A. That is generally the case. It is very seldom that one comes in over the counter.

Q. You don't recall any case where that happened? A. I recall a small outfit doing that a couple of years back, but I would have to check the record back to know who it was. But I think they were late in filing, and we got after them on the long distance phone, and they sent a man over.

Q. Is that the only case you remember? A. I don't recall anything else, but I am not saying that others have not come in that way, because I don't recall them.

Q. That is your recollection? A. Yes. We ask them to send them in by registered mail.

Q. The audits that are made out of the District
14 of Columbia involve certain travel and certain expense on the part of the auditors, do they not? A. That is correct.

Q. Who pays the expense of those audits, that is: the travel expense? A. The District of Columbia.

Q. Have you ever had any conferences with gasoline importer licensees in connection with their license status or their tax status?

Mr. Earnest: I object to the question only because it seems to me to be rather broad and all-inclusive. Do you mean, has he ever talked to anybody about anything of that sort?

Mr. Colin: We will narrow it down. He might say "no", and then that is it.

The Witness: I can't say "no." Let us take the tax returns, first. On audits, we discuss them at least one time and generally the audit is worked up by the tax auditors, and there is an agreement before it is submitted as to the facts. As to the licensee, which I think was the other part of your question—

By Mr. Colin:

Q. Yes, sir. A. The only one I believe I recall talking to directly was—no, I'll have to take that back. When this question came up first it seems to me a couple of companies called me on the telephone but I couldn't tell you now who they were.

Q. Then am I correct in understanding your testimony to be that you have within the years of your experience had only one conference or discussion with a licensee regarding an audit matter? A. I believe that is right.

Q. And you have had no personal conferences or discussions regarding license matters other than several recent telephone conversations relating to the law question contained in this instant litigation? It that right? A. I would have to say "no." The only thing there which might change my answer would be talking to Mr. Davis, but I don't recall talking about licensees, other than some long distance calls, as I recall it.

Q. That happened only after this litigation started, and it was in connection with the question posed by this litigation; is that right? A. That is right. Let me qual-

ify that. In a year when somebody might have been a little late filing, and it came to the 20th of June, we usually try to get them on the phone, but I am discounting that and I am talking about the actual license itself.

Q. That is what I meant. It was a substantive question.

16 I gather, then, that the wheels turn rather smoothly, and without difficulty in this whole procedure. It is more or less automatic. The license applications are filed and licenses issued, and the returns and payments are also filed in a more or less automatic manner. Is that right?

Mr. Earnest: Are you posing that as a question or as a conclusion? If you want the administrative procedure involved, I think we are in a position to tell you what happened when Mr. Ahearn was there, at least.

Mr. Colin: That is the question.

Mr. Earnest: I think the way you put it, it is nothing more than a conclusion, to which you are asking the witness to subscribe or not to subscribe.

Mr. Colin: That is exactly what I am doing.

Mr. Earnest: Then I do not think the witness should be put in that position, and I would object to him answering it. If you want him to tell you what goes on, I have no objection to his giving you a dissertation.

Mr. Colin: Off the record, Mr. Reporter, please.

(Discussion off the record.)

Mr. Earnest: Back on the record. Read the question, Mr. Reporter.

(Question read.)

Mr. Earnest: I withdraw my objection. Answer it the way you want to, Mr. Ahearn.

17 The Witness: I would say that, substantially, that is correct.

By Mr. Colin:

Q. Do you have any licensees who are domestic corporations or do you have the names of licensees for the licenses domesticated in the District of Columbia? A. I wouldn't want to answer that without looking at the record, but I think so.

Q. You think you do? A. Yes, sir.

Q. Would you be good enough to check that and at our next meeting furnish me with that information? A. Yes, sir.

Q. Can you tell me where the members of the domestic plants or places of business may be audited? A. Is this on the record or off the record?

Q. Yes, that is a question. A. That is information you want submitted the next time?

Q. Yes. I assume that you cannot tell me now, and you would have to check it. Is that right? A. That is right.

Mr. Colin: Will you work up that material for submission when we meet again.

Mr. Earnest: I have no objection to that.

18 By Mr. Colin:

Q. Mr. Ahearn, who was your predecessor in handling this licensing and auditing function? A. This is prior to 1950, and it does not take in the auditing then. The auditing prior to 1955 was done by the Accounting Office and A. R. Pilkerton was the auditor. Prior to September 1, 1950 James L. Martin was the Assistant Assessor.

Q. Is he still with the District? A. He is retired and in California now.

Mr. Earnest: You are leaving one-half of your question hanging. You said auditing, and he gave the name of Pilkerton.

By Mr. Colin:

Q. Pilkerton, prior to 1955? A. That is correct.

Q. Going back to what date? A. That was originally in the Personal Property Tax Section, and I do not know when it was transferred to Pilkerton, and then in 1955 it was transferred back to Personal Property.

Q. Which is yourself?. A. Yes, sir. I have an idea that it was some time in the 40's.

Q. The licensing from 1950 on was with you?

19 A. That is correct. I think that was always in the Personal Property Tax Office.

Q. And from 1950 on under you? A. That is right.

Q. And before that under Mr. Martin? A. Before that under Mr. Martin, and prior to that whoever was in Mr. Martin's job, but I do not know who it was.

Mr. Colin: That is all I have.

Mr. Earnest: I have no questions except to make one statement.

With respect to the several items which Defendants have agreed to produce, if the records are available I want to state as counsel for the Defendant that this will be done if the Board of Commissioners and Mr. Back, who are not present, do not object to the furnishing of said information.

Mr. Colin: How about an adjourned date on this deposition for the purpose of furnishing the data which you are going to look up?

Mr. Earnest: Let us tentatively set it up for December 4th, at 10:30.

Mr. Colin: It being understood, of course, that Mr. Ahearn will attend at that time.

(Thereupon the deposition in the above-entitled matter was adjourned until 10:30 o'clock a.m., December 4, 1958.)

(Filed Oct. 4, 1961)

Plaintiff's Motion for a Hearing on Remand

Plaintiff, Cities Service Oil Company, a corporation, moves for a hearing, pursuant to the judgment of remand by the United States Court of Appeals for the District of Columbia Circuit entered May 25, 1961, to determine the necessary requirements for plaintiff to obtain a motor-fuel importer's license in the District of Columbia pursuant to Section 47-1903 District of Columbia Code 1951 edition, upon the following grounds:

1. The above mentioned remand was to this Court for further proceedings not inconsistent with the opinion of the Court.

2. Subsequent to the remand, plaintiff duly filed its application with the District of Columbia Government for license as motor fuel importer for the period beginning July 1, 1961 and ending June 30, 1962 in what it considered due and proper form.

3. The defendants, through the Corporation Counsel, advised plaintiff that such application was not satisfactory; whereupon, plaintiff filed a new application which it understood would be in compliance with the requirements of the defendants and the Corporation Counsel of the District as well as in compliance with the said statute and the opinion of the Court of Appeals pertaining thereto; however, plaintiff has been advised that such application will not be acceptable to the defendants. Copy of the last application (minus the schedule attached to question No. 7, not material here) is annexed hereto and made a part hereof. Plaintiff also filed with the District of Columbia Government the usual motor fuel importer's bond, which is not attached because it is likewise not material to the present controversy.

4. Plaintiff considers and contends that the said last application does comply with the statute and opinion of the Circuit Court of Appeals and that the license should be issued by the defendants to the plaintiff.

KAHL K. SPRIGGS
Kahl K. Spriggs
504 Southern Building
Washington, D. C.
Attorney for Plaintiff

(Filed Oct. 4, 1961)

GOVERNMENT OF THE DISTRICT OF COLUMBIA
FINANCE DIVISION
REVENUE DIVISION

Application for License as Motor Vehicle Fuel Importer
District of Columbia

DISTRICT OF COLUMBIA, ss:

1. I (we) Cities Service Oil Company (Corporation) a dealer of motor vehicle fuel, hereby make application for a license as MOTOR VEHICLE FUEL IMPORTER for the place of business shown herein, for the period beginning July, 1961, and ending June 30, 1962, and aver that the answers made herein are true and correct.
2. Name Cities Service Oil Company (Corporation)
3. Address 60 Wall Street, New York, New York
4. State if corporation, partnership, or individual Corporation
5. Name under which applicant intends to transact business Cities Service Oil Company (Corporation) 60 Wall Street, New York, New York

6. If partnership, gives names and addresses of each person constituting same

7. If corporation, give the names, titles, and addresses of the officers and directors on separate sheet. See Schedule Attached

8. If corporation give the name and address of the officer charged with the duty of filing motor vehicle fuel tax reports. R. A. Cuthbertson—Secretary, 60 Wall Street, New York 5, New York

9. Under the laws of what State was corporation chartered? Delaware

10. Date of incorporation October 9, 1909

11. Date business was established October 9, 1909

12. If foreign corporation, name and address of resident general agent in District of Columbia. None

13. If a corporation, are you registered with the Superintendent of Corporations of the District of Columbia? Yes

14. Importer's local office or place of business in the District of Columbia None See Item 15

15. Name of local representative in the District of Columbia. United States Corporation Company

16. Place of business of local representative in the District of Columbia 1346 "F" St., N. W.

17. What do you estimate will be your monthly distribution of sales of taxable motor vehicle fuel? 500,000 gallons.

18. Are you distributing trade-marked motor vehicle fuel of another oil company or distributor: No

19. If so, give name of company or distributor from whom you purchase motor vehicle fuel

20. From what point or points are shipments received? Rosslyn, Va.; Fairfield, Md.

21. List on back of this application locations of all self-owned or self-operated bulk plants and terminals in District of Columbia.

22. List on back all self-owned and self-operated service stations in District of Columbia.

23. If no storage maintained in District of Columbia, furnish list of District of Columbia customers with addresses on separate sheet, and on back state "No storage maintained in District of Columbia." The list of self-owned or self-operated terminals, bulk plants, and service stations shown on back of this form is a true and accurate statement of all properties owned and operated, or operated for our account, in the District of Columbia.

G. F. WALKER
Asst. Secretary

By CITIES SERVICE OIL COMPANY
C. W. LANG
Vice-President

Application shall be signed and sworn to by the owner of such business, if owned by an individual; by the partners, if owned by a partnership; or by the president and secretary of the corporation, or by its manager or resident general agent, if owned by a corporation. (Sec. 47-1903, D. C. Code 1951 edition).

AFFIDAVIT

On this 16th day of August, 1961, before me, a notary public, personally appeared the above-named importer or authorized representative known to me, who makes oath in due form of law that the matters and things set forth in

this application are true as therein set forth to the best of his knowledge and belief.

Witness my hand ANNE M. CHRISTOPHER
Notary Public

My commission expires 3/30/62

LIST BELOW ALL BULK PLANTS, SELF-OPERATED SERVICE STATIONS, AND TERMINALS

No storage maintained in District of Columbia.
It is essential that each bulk plant and terminal be listed. List any bulk plants owned or controlled and not in operation, and so designate.

(Filed October 14, 1961)

Motion of Defendants for Further Proceedings Pursuant to the Opinion of the United States Court of Appeals for the District of Columbia Circuit

The defendants move the Court for further proceedings in this matter pursuant to the opinion of the United States Court of Appeals for the District of Columbia Circuit in the case of *Cities Service Oil Co.* v. *McLaughlin, et al* (1961), * * * U. S. App. D.C. * * *, 292 F. 2d 759, on the following grounds:

1. By its opinion the Court of Appeals provided that:

> "In order to afford an opportunity to permit compliance in accordance with this opinion, the judgment of the District Court is vacated and the case is remanded for further proceedings not inconsistent with this opinion."

2. Cities Service Oil Co. has not complied with the requirements for a license as a motor vehicle fuel importer in the District of Columbia as enunciated in the Court of Appeals' opinion.

3. Cities Service Oil Co. is engaging in the business of importing motor vehicle fuel into the District of Columbia without benefit of a license and other statutory or regulatory requirements.

Defendants have attached hereto and by reference incorporate herein and ask to be read as a part hereof, the application of Cities Service for a motor vehicle fuel importer's license dated June 1, 1961, a copy of which appears as Exhibit "A", and its application for such license dated August 16, 1961, a copy of which appears as Exhibit "B".

Based on the foregoing, the defendants move the Court to dissolve its order of October 3, 1960, continuing, pending appeal, the preliminary injunction heretofore granted to Cities Service herein and to enter an order in this case dismissing the complaint.

/s/ CHESTER H. GRAY
Chester H. Gray
Corporation Counsel, D. C.,

/s/ JOHN A. EARNEST
John A. Earnest,
Assistant Corporation Counsel, D. C.,
Attorneys for the Defendants,
District Building,
Washington 4, D. C.

EXHIBIT A

GOVERNMENT OF THE DISTRICT OF COLUMBIA

FINANCE DIVISION

REVENUE DIVISION

Application for License as Motor Vehicle Fuel Importer
District of Columbia

DISTRICT OF COLUMBIA, ss:

1. I (we), Cities Service Oil Company (Corporation) a dealer of motor vehicle fuel, hereby make application for a license as MOTOR VEHICLE FUEL IMPORTER for the places of business shown herein, for the period beginning July 1, 1961, and ending June 30, 1962, and adver that the answers made herein are true and correct.
2. Name Cities Service Oil Company (Corporation)
3. Address 60 Wall Street, New York, New York
4. State if corporation, partnership, or individual Corporation
5. Name under which applicant intends to transact business Cities Service Oil Company (Corporation) 60 Wall Street, New York, New York
6. If partnership, give names and addresses of each person constituting same
7. If corporation, give the names, titles, and addresses of the officers and directors on separate sheet. See Schedule Attached
8. If corporation give the name and address of the officer charged with the duty of filing motor vehicle fuel tax reports. R. A. Cuthbertson—Secretary, 60 Wall Street New York 5, New York

9. Under the laws of what State was corporation chartered? Delaware

10. Date of incorporation October 9, 1909

11. Date business was established October 9, 1909

12. If foreign corporation, name and address of resident general agent in District of Columbia. None. Local representative—for service of process—named in item 15 below

13. If a corporation, are you registered with the Superintendent of Corporations of the District of Columbia? Yes

14. Importer's local office or place of business in the District of Columbia. None. See Item 15

15. Name of local representative in the District of Columbia United States Corporation Company

16. Place of business of local representative in the District of Columbia 1346 "F" St., N.W.

17. What do you estimate will be your monthly distribution of sales of taxable motor vehicle fuel? 500,000 gallons.

18. Are you distributing trade-marked motor vehicle fuel of another oil company or distributor: No

19. If so, give name of company or distributor from whom you purchase motor fuel

20. From what point or points are shipments received? Rosslyn, Va.; Fairfield, Md.

21. List on back of this application locations of all self-owned or self-operated bulk plants and terminals in District of Columbia.

22. List on back all self-owned and self-operated service stations in District of Columbia.

23. If no storage maintained in District of Columbia, furnish list of District of Columbia customers with addresses on separate sheet, and on back state "No storage maintained in District of Columbia." The list of self-owned or self-operated terminals, bulk plants, and service stations shown on back of this form is a true and accurate statement of all properties owned and operated, or operated for our account, in the District of Columbia.

GEORGE F. WALKER
Asst. Secretary

By CITIES SERVICE OIL COMPANY
C. W. LANG
Vice President

Application shall be signed and sworn to by the owner of such business, if owned by an individual; by the partners, if owned by a partnership; or by the president and secretary of the corporation, or by its manager or resident general agent, if owned by a corporation. (Sec. 47-1903, D. C. Code 1951 edition).

AFFIDAVIT

On this 1st day of June, 1961, before me, a notary public, personally appeared the above-named importer or authorized representative known to me, who makes oath in due form of law that the matters and things set forth in this application are true as therein set forth to the best of his knowledge and belief.

Witness my hand ANNE M. CHRISTOPHER
Notary Public

My commission expires 3/30/62

LIST BELOW ALL BULK PLANTS, SELF-OPERATED SERVICE STATIONS, AND TERMINALS

No storage maintained in District of Columbia.
It is essential that each bulk plant and terminal be listed.
List any bulk plants owned or controlled and not in operation, and so designate.

[Copy of Exhibit B to motion of Defendants for further proceeding pursuant to the opinion of the United States Court of Appeals for the District of Columbia Circuit found on pages 50-53 of this joint appendix.]

(Filed Nov. 28, 1961)

Proceedings Before Judge Holtzoff—November 14, 1961
Order

The above-captioned cause came on for hearing of motions before the HONORABLE ALEXANDER HOLTZOFF, Judge, United States District Court for the District of Columbia.

Appearances:

On behalf of the Plaintiff:
KAHL K. SPRIGGS, Esq.
GEORGE H. COLIN, Esq.

On behalf of the Defendants:
JOHN A. EARNEST, Esq.
Assistant Corporation Counsel

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2 PROCEEDINGS

The Deputy Clerk: Cities Service vs. Tobriner.

Mr. Spriggs: If Your Honor please, you may recall that Mr. Colin, a member of the Bar of the Court of Appeals for the State of New York, was admitted pro hac

vice at some earlier stage of the proceedings here. There is a motion this morning before Your Honor which has been made by Cities Service Oil Company, the plaintiff, and therefore I move that Mr. Colin be permitted—

The Court: This gentleman has already been admitted pro hace vice.

Mr. Colin: May it please Your Honor, the plaintiff in this case has moved for proceedings herein pursuant to a judgment of remand which was made by the Court of Appeals. The defendant has made a motion shortly subsequent to plaintiff's motion for an order vacating the preliminary injunction that was entered in this case.

The Court: Just a moment. This case went to the Court of Appeals. The question was, as I recall it, whether the plaintiff was required to obtain a license. The Court of Appeals held it was not required. Is there anything else to be done?

Mr. Colin: That isn't precisely it, Your Honor, but it is substantially it.

The Court: When you say substantially—

3 Mr. Colin: The question was whether the plaintiff was required to have a resident general agent named in its application for the license, and the Court of Appeals held that it was not, sir.

The Court: Very well. The action was to obtain a license on the papers that you submitted, and the Court of Appeals held that you were entitled to obtain a license.

Mr. Colin: That is the way we construe their judgment.

The Court: What is there before me?

Mr. Colin: What we have done, in pursuance of that precise point of view, Your Honor, is submit to the District an application for a license.

The Court: No; what you submit to me is an order on the mandate, and I sign the order on the mandate, and that is all. I think your local counsel knows that is our local procedure. You do not submit any application for a license to this Court.

Mr. Colin: No, I had submitted it to the District on the assumption that the license would be granted and the case thus substantially disposed of. That application was not approved, and that is why we are here. But if Your Honor's suggestion is along the lines just indicated, then I suppose there is no need for me to—

The Court: What do you say, Mr. Spriggs? Perhaps your associate is not too familiar with our local practice. Every District has its own ways of doing things.

Mr. Spriggs: We could do that, Your Honor, but I believe it would probably bring up the same things that would be argued before Your Honor this morning.

We have submitted the application in the form which we think met the opinion of the Court of Appeals, and it was rejected by the District. So, that is what—

The Court: I will hear Mr. Earnest. Has an order been entered on this mandate?

Mr. Spriggs: No, Your Honor, it has not.

The Court: I think what you have to do is to submit an order on the mandate, and that ends the case.

Mr. Spriggs: Very well, Your Honor, that is what we will do.

The Court: What do you say, Mr. Earnest?

Mr. Earnest: I say that the Court of Appeals, Your Honor, although it did set aside your ruling, in fact ruled with you, with an additional proviso. You ruled, pursuant to statute, that a person desiring, or a corporation desiring to engage in the business of importing motor fuel into the District of Columbia had to name a resident general agent. The Court of Appeals said that was too strict an interpretation. They said if they have a resident general agent, they have to name it; however, if they don't have a resident general agent, they don't have to go out and hire somebody specifically called—

The Court: I held they did because I thought that other-

wise they might escape franchise tax, which is back of this whole controversy, anyway.

Mr. Earnest: That is all this case ever was. I am not a tax lawyer, Mr. Colin is. This is a tax case.

The Court: Apparently the Court of Appeals just did not realize that what the plaintiff was trying to do was to conduct business in the District of Columbia as a foreign corporation without paying a franchise tax, so they established their headquarters across the District line and just named somebody to accept service of papers here instead of a general agent.

Well, I thought that was a—I do not want to use any colloquial words, but it was a little too smart for me.

Mr. Earnest: Let me point out what the Court of Appeals did, if I may, in this case. They said they didn't have to name this resident general agent unless they had one. Then they went on to say, however, if you want the license and you don't have a resident general agent, then your must name, under Article 26 of the Police Regulations, your local representative and you must maintain a local office within the District of Columbia.

That is why we are here today.

6 Now, in the concluding paragraph of its opinion, the Court of Appeals said, in order to afford an opportunity to permit compliance in accordance with this opinion the judgment of the District Court is vacated and the case is remanded for further proceedings not inconsistent with the opinion. And the opinion is just what I said, Your Honor, they don't have to have a resident general agent, but if they don't have one, then they must name a local representative and maintain an office in the District of Columbia.

The Court: You say if they do not have a general agent they must have an office here?

Mr. Earnest: The Court of Appeals opinion says so.

The Court: If they have an office here, you cannot have an office without having somebody in charge, and he would be the general agent.

Mr. Earnest: He could be the local representative. The Court of Appeals said that would be perfectly proper.

The Court: And not a general agent?

Mr. Earnest: They can have one or the other, but they must have one or the other. That is what the Court of Appeals opinion said.

The Court: Let me see the opinion.

I do not know why it has taken all this time for this matter to come before me.

(The document was handed to the Court.)

7 The Court: I am inclined to think you are right, Mr. Earnest.

What do you say about that, gentlemen?

The opinion of the Court of Appeals states that the statute does not require the corporation to procure and designate an agent of that description, meaning a resident agent. However, to qualify for a license the importer is required to designate a local representative and maintain a local office or place of business within the District of Columbia. In the absence of an agent known as a resident general agent, compliance with licensing statute requires designation in the application of such representative as the regulation specifies.

Now, Mr. Colin, what are you requesting this Court to do?

Mr. Colin: We say this, if Your Honor please, we say that the application which we have submitted to the District, a copy of which is attached to the papers herein, the application dated August 16, 1961, is one that entitles us to the issuance of a license.

The Court: What are you asking this Court to do?

Mr. Colin: We are saying to this Court, if Your Honor please, that we seek a direction or order from Your Honor based on this application.

The Court: What are you asking this Court to do?

8 Will you give me a direct answer?

Mr. Colin: Yes, sir. We ask this Court either to direct the District to issue a license pursuant to the application which we filed, or failing that, if Your Honor please, to afford us a trial in this case.

The Court: There is nothing to be tried.

Mr. Colin: Well, if Your Honor will recall, sir, if you will remember the earlier hearing held before you, there was presented in the papers on summary judgment proof to the effect that in some twenty-odd instances affecting virtually all of the oil companies—

The Court: You say you are asking for a trial. Trial of what? On what issue?

Mr. Colin: We raise the issue, if Your Honor please, of due process in respect of the denial to this plaintiff of a license under an application virtually identical with those on which licenses have been granted to many other—

The Court: That is not an issue to be tried. The mere fact that the District might have overlooked errors in other applications does not give you a vested right.

Mr. Colin: I think it is a question of due process, if Your Honor please.

The Court: No, it is not. I am not going to try that issue. The only matter that I shall pass on is whether the new application complies with the opinion of

9 the Court of Appeals.

Are you referring to the application dated August 16, 1961, that is attached to the motion?

Mr. Colin: I do, Your Honor; but I should very much like for the record, if Your Honor please, to reserve our position in respect of the right to go to trial on the issues of due process which we have heretofore raised.

The Court: You may reserve your right.

Mr. Colin: And I may say this, in respect to this application: I direct Your Honor's attention to the fact

that at line 15 of the application, calling for the name of local representative in the District of Columbia, we have filled in United States Corporation company; line 16, place of business of local representative, we have filled in a District address.

The Court: That does not comply with the requirement of the opinion of the Court of Appeals. There are two requirements. One is that you must designate a local representative. I presume a corporation may be a local representative here, so that you comply with that first requirement. United States Corporation Company. But you must also maintain a local office or place of business within the District of Columbia. That does not mean that the local representative must maintain a local office or place of business, but that you must.

Mr. Colin: May I be heard on that point?

The Court: Very briefly.

Mr. Colin: Number one, I point out, as I have previously stated, that applications in this form have been granted to others.

The Court: Do not repeat what you have previously stated.

Mr. Colin: Number two—

The Court: Just a moment. Everybody stops when the Court speaks.

Do not repeat what you have previously stated.

Mr. Colin: I would also point out, if Your Honor please, that this requirement must be read in conjunction with the provision of the taxing statute, which affords an exemption from franchise tax to corporations which do not have an office within the District.

If it be required that an oil company, to obtain a license, must have an office within the District, then, in effect, it is being deprived of the exemption which is afforded to all corporations, without exception, under a cognate statute.

The Court: I suggest, then, you ask for rehearing in the Court of Appeals, if you want to. I am governed

by the opinion of the Court of Appeals and I shall enforce it. In fact, I have no alternative but to do so.

11 I want to suggest this to you, Mr. Spriggs, that as a matter of regular procedure you present an order on the mandate, which I shall be glad to sign.

But assuming that it has been signed, I will deny the further motion to require the District to accept this new application.

Mr. Colin: Your Honor, may we ask, under such circumstances, that the preliminary injunction be continued so that this question which is raised in good faith may be tested out?

The Court: What do you say, Mr. Earnest? Do you consent?

Mr. Earnest: No, sir.

The Court: I shall not continue the preliminary injunction.

Mr. Colin: Your Honor, may I say that this corporation has posted a bond exactly as required under the statute to assure the payment of all motor fuel taxes, that all taxes have been paid—

The Court: Gentlemen, I shall not grant a preliminary injunction. This matter has been thrashed out by the Court of Appeals.

Is there a preliminary injunction outstanding now?

Mr. Colin: There is, sir. I submit—

The Court: Just a moment. I am used to having

12 counsel answer my questions.

Mr. Colin: I did, sir. I said there is.

The Court: Very well, then stop a moment.

Were you about to address the Court, Mr. Spriggs?

Mr. Spriggs: No, I was just about to make a suggestion to Mr. Colin.

The Court: I am not going to continue the preliminary injunction.

Mr. Colin: May I say, sir—

The Court: Just a moment.

Mr. Spriggs: Might I address the Court? Would Your Honor consider staying the effect of the order for a limited time, pending our application to the Court of Appeals?

The Court: Yes, I thought that is what you rose for.

You know, if you let local counsel, who is familiar with local practice, handle those matters, counsel would be better off.

I would be inclined to grant a ten-day stay, Mr. Earnest. Is there any objection to that?

Mr. Earnest: Not to a ten-day stay, Your Honor.

We have been under restraint for almost four years, and it is about time we got out from under it, but ten days won't bother us.

The Court: I am going to deny the motion to 13 direct the District to accept the application.

What is the nature of the preliminary injunction now outstanding, Mr. Spriggs? I would want to know what I might be staying.

Mr. Spriggs: That was a preliminary injunction granted pursuant to the mandate of the Court of Appeals in the prior appeal.

The Court: I understand, but what does the injunction enjoin?

Mr. Spriggs: It restrains the defendants from interfering or restricting with the plaintiff in the importations of motor fuel in the District of Columbia.

The Court: Very well, I will continue that for ten days.

You have a motion, Mr. Earnest. I do not quite follow your motion.

Mr. Earnest: My motion was for the same thing, except one additional fact, and that was to dissolve the injunction that we are under.

The Court: Do you want to withdraw your motion so as to clear the record?

Mr. Earnest: I will withdraw my motion, Your Honor.

The Court: Very well. Thank you, gentlemen.

(Thereupon, the hearing stood concluded.)

(Filed Nov. 29, 1961)

Notice of Appeal

Notice is hereby given this 29th day of November, 1961, that Plaintiff, Cities Service Oil Company, a corporation, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 27th day of November, 1961 in favor of defendants, Walter N. Tobriner, John B. Duncan and Frederick J. Clarke, Commissioners of the District of Columbia, and Kenneth Back, Assessor for the District of Columbia against said Cities Service Oil Company

(a) denying motion of plaintiff to direct defendants to accept plaintiff's application for license as a motor vehicle fuel importer in the District of Columbia dated August 16, 1961, and to issue a license thereon to plaintiff, or (b) in the alternative, for a trial, and (c) dismissing the complaint.

ELLIS, HOUGHTON & ELLIS

By KAHL K. SPRIGGS
Kahl K. Spriggs
504 Southern Building
Washington 5, D. C.
Attorney for Plaintiff

(Filed June 28, 1957)

Memorandum

Motion for preliminary injunction and declaratory judgment denied, and cause dismissed. The plaintiff had no difficulty in complying with the statute for almost a period of 20 years, as an examination of its applications for license over that period indicates. This is directly contrary to the sworn affidavit of its Vice President, which says (Par. 4 of same): "Plaintiff does not now nor has it at any time had a 'resident general agent' in the District."

The fact is that for almost 20 years it presumably designated itself as such.

Apart from that the Court takes the view that the statutory provision is mandatory, and there is no showing not only of irreparable injury but, indeed, of no injury at all. If it is subsequent tax liability the plaintiff is disturbed about—with reference to that there is an adequate remedy at law when the time comes, if ever.

MATTHHEW F. McGUIRE
Matthew F. McGuire
United States District Judge

June 28, 1957

Appeal from the United States District Court for the District of Columbia.

Decided May 29, 1958

Before Edgerton, Chief Judge, and Prettyman and Fahy, Circuit Judges.

PER CURIAM: Appellant Cities Service Oil Company brought a civil action in the District Court to enjoin officials of the District of Columbia government from interfering with its importation of motor fuel into the District, and also to require those officials to issue to it (appellant) a motor fuel importer's license for the year beginning July 1, 1957. In its complaint Cities Service alleged that the defendant officials had denied its application for a license on the ground it had not set forth on the application the name of its "resident general agent". Cities Service then alleged that it "does not have and has at no time had" a resident general agent in the District. It moved for preliminary injunction. In a supporting affidavit it said it had had a license for at least twenty years, and it renewed its allegation that it had not at any time had a resident general agent here. In an opposing affidavit an assistant assessor of the District of Columbia said that Cities Service's application over the twenty years had named a resident general agent. The District Court found that for almost twenty years the Company had designated itself as its resident general agent. It denied the preliminary injunction and dismissed the complaint.

We think the position of the District Court was well taken. After having been licensed for twenty years Cities Service was seeking injunctive relief against the local government in a license dispute. It denied it had ever had a resident general agent, despite the fact that for twenty years it had answered on its successive applications that

it had such an agent, naming itself with a local address. It failed to show cause for relief by an equity court.

Cities Service says the trial court erred in looking at the prior years' applications. But a foundation for such an examination was laid in the affidavits on both sides, and no objection was lodged with the court.

AFFIRMED.

Before: Edgerton, Chief Judge, Prettyman and Fahy, Circuit Judges, in Chambers.

Order

Upon consideration of appellant's petition for a rehearing of appellees' answer, and of the supplemental memoranda filed by the parties, it is

ORDERED by the court that the petition for rehearing be, and it is hereby, granted, without allowing oral argument, and that the opinion and judgment of this court entered herein May 29, 1958, be and they are hereby, vacated.

It is FURTHER ORDERED by the court that the order of the District Court dismissing the complaint be, and it is hereby, vacated and that this case be, and it is hereby, remanded to the District Court with directions to grant a preliminary injunction and to hold a hearing on the complaint and decide whether appellant must have a general agent in the District of Columbia in order to qualify for a license.

PER CURIAM

Dated: September 10, 1958.

(Filed October 3, 1960)

Order

This matter came on for hearing on plaintiff's motion for summary judgment and on defendant's cross-motion for summary judgment. Upon consideration of the respective motions, of the points and authorities in support of and in opposition thereto, and of oral argument by counsel for all parties in open court, it is by the court, this 3rd day of October, 1960.

ORDERED: That the plaintiff's motion for summary judgment be, and the same is, hereby denied, and it is

FURTHER ORDERED: That the cross-motion of the defendants Robert E. McLaughlin, Mark Sullivan, Jr., Frederick J. Clarke, and Kenneth A. Back for summary judgment in their favor against the plaintiff be, and the same is, hereby granted, and the complaint is hereby dismissed.

/s/ ALEXANDER HOLTZOFF
Judge

Appeal from the United States District Court for the District of Columbia

Decided May 25, 1961

Before EDGERTON, PRETTYMAN and FAHY, *Circuit Judges*

FAHY, Circuit Judge: The District of Columbia Motor Fuel Tax Law of 1924 forbids importation or manufacture of motor vehicle fuel without a license issued by the Commissioners of the District of Columbia, and provides that the application for the license "shall contain (1) the name of the applicant; (2) the name under which the applicant intends to transact business and the name and place of business of the local representative; (3) the location of the applicant's place of business; (4) the date such business was established; and (5) any other information required under regulations promulgated by the Commissioners of the District of Columbia. In case the applicant is a corporation, the application shall also contain the corporate name, place, and time of incorporation, and the names of the officers and directors, and, if a foreign corporation, the name of its resident general agent * * *" 47 D. C. Code Sec. 1903 (1951).

Article 26, entitled Motor Vehicle Fuel Tax, of the Police Regulations of the District of Columbia, effective December 2, 1942, provides in Section 2 that "Every licensed importer shall designate a local representative and maintain a local office or place of business within the District of Columbia * * *". This regulation is authorized by 47 D. C. Code Sec. 1916 (1951) which empowers the Commissioners to make such regulations as in their judgment are necessary for the administration of the motor fuel tax.

In the application for license as a motor fuel importer which appellant filed in 1957 it replied to the "resident general agent" question as follows: "NONE. Limited

Agent: United States Corporation Co., 1111 National Press Bldg., Washington, D. C." The license was refused and appellant brought this suit. The District Court denied relief because it thought the statute required a foreign corporation to designate a resident general agent in order to get a license.

We interpret the statute somewhat differently. If the Corporation does not have a representative within the District who is a "resident general agent" the statute does not require the corporation to procure and designate an agent of that description. However, considering the nature of the business of importing motor fuel, the supervision of such business intended by the Motor Fuel Tax Law, and the Article 26 regulation referred to above, the importer, to qualify for a license, is required to designate a local representative and maintain a local office or place of business within the District of Columbia. In the absence of an agent known as a "resident general agent," compliance with the licensing statute requires the designation in the application of such a representative as the regulation specifies. We think this is a reasonable construction of the statute. It avoids giving the reference to a "resident general agent" a construction which requires an agent of that precise description, while at the same time it does require a local representative of requisite authority to be designated and specified in the application for a license.

In order to afford an opportunity to permit compliance in accordance with this opinion, the judgment of the District Court is vacated and the case is remanded for further proceedings not inconsistent with this opinion.

It Is So Ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 19
No. 16,065

CITIES SERVICE OIL COMPANY,
Appellant,

v.

ROBERT E. McLAUGHLIN, Commissioner of the District of Columbia, et al.,
Appellees.

Before: Edgerton, Prettyman and Fahy, Circuit Judges, in Chambers.

Order

Upon consideration of appellant's motion for leave to file a petition for rehearing and to recall and stay judgment and of appellees' opposition, it is

ORDERED by the court that the motion is denied.

PER CURIAM.

Dated: July 18, 1961

(Filed Nov. 27, 1961)

Order

Upon consideration of plaintiff's motion for a hearing on remand and of defendants' motion for further proceedings pursuant to the order of the United States Court of Appeals for the District of Columbia Circuit, and after argument, it is, by the Court, this 27th day of November 1961

ORDERED: That the motion of plaintiff to direct the defendants to accept plaintiff's application for license as a motor vehicle fuel importer in the District of Columbia dated August 16, 1961, and to issue a license thereon to plaintiff, or in the alternative, for a trial be, and the same hereby is, denied and the complaint herein be, and the same hereby is, dismissed.

ALEXANDER HOLTZOFF
Judge

(Filed Nov. 27, 1961)

Order for Stay

Upon consideration of plaintiff's oral motion for stay heretofore made herein, it is by the Court this 27 day of November, 1961,

ORDERED, that for a period of ten days from the date of the order made by this Court herein on November 27, 1961, the defendants, herein be, and they hereby are, stayed or restrained from restricting or interfering with plaintiff, Cities Service Oil Company, in importations and deliveries of motor vehicle fuel in the District of Columbia because plaintiff has not been issued a motor vehicle fuel importer's license for the annual period beginning July 1, 1961: Provided, however, that plaintiff furnish the District of Columbia a motor fuel bond, with surety, in the penalty of the sum of $20,000.00, conditioned to indemnify the District of Columbia for the payment of all motor fuel taxes on importations and deliveries of motor fuel in the District of Columbia made by plaintiff on and after July 1, 1961.

/s/ ALEXANDER HOLTZOFF
Judge

No objection as to form:

/s/ KAHL K. SPRIGGS
Kahl K. Spriggs,
Attorney for Plaintiff

/s/ JOHN A. EARNEST
John A. Earnest,
Assistant Corporation Counsel, D. C.
Attorney for Defendants

(Filed Dec. 7, 1961)

Before: Wilbur K. Miller, Chief Judge, and Bazelon and Fahy, Circuit Judges.

Order

This case came on for consideration of appellant's application for an injunction pending appeal and said application was argued by counsel.

Upon consideration whereof it is ORDERED by the court that appellees are enjoined from restricting or interfering with appellant in importations and deliveries of motor vehicle fuel in the District of Columbia on the ground that appellant has not been issued a motor vehicle fuel importer's license for the annual period beginning July 1, 1961, pending disposition of this appeal or further order of this court.

PER CURIAM.

Dated: Dec. 7, 1961

Appeal from the United States District Court for the District of Columbia

Decided May 31, 1962

Before Edgerton, Fahy and Washington Circuit Judges.

FAHY, Circuit Judge: When the case was here before, *Cities Service Oil Co.* v. *McLaughlin*, 110 U. S. App. D. C. 266, 292 F. 2d 759, we were presented with the question whether the District of Columbia Motor Fuel Tax Law required a foreign corporation which desired a license to import motor-vehicle fuel into the District of Columbia to have a resident general agent. The statute provided that the applicant should give the name of its resident general agent. We held that if the corporation did not have an agent of that description the statute did not require one to be procured.

In reaching the above conclusion we considered inter alia Article 26, section 2, of the Police Regulations of the District of Columbia, which requires the importer, in qualifying for a license, to designate a local representative and to maintain a local office or place of business within the District of Columbia. We held that in the absence of a resident general agent the licensing statute required the corporation to designate such a representative as Article 26 specifies. We remanded the case to the District Court to afford the Company an opportunity to comply.

After the remand the Commissioners revised the application form to conform with our decision, that is, to call for the address of the applicant's local office or place of business in the District of Columbia. The Company applied again, but in answer to the request for its local office or place of business stated "None. See Item 15".

The answer to Item 15 gave "United States Corporation Company, as the name of the Company's local representative in the District of Columbia, but did not name, or say that the Company had, a local office or place of business. The Company clearly had no intention of claiming that it had a local office or place of business, for its answer to question 12, "Name and address of resident general agent in District of Columbia," was "None. Local representative—*for service of process*—named in item 15 below" (emphasis added).

Thereupon the Commissioners, through the Corporation Counsel advised the Company that its application was unsatisfactory. The Company then moved in the District Court for an order to compel the Commissioners to issue a license to it to import motor-vehicle fuel for the year beginning July 1, 1961, pursuant to the application above referred to, or in the alternative for a trial on the merits. The motion was denied. The Commissioners' cross-motion to dismiss the complaint was granted, with the effect of dissolving an injunction which had preserved the Company's importing activities pending final disposition of the case. The Company's application for an injunction pending appeal was granted by this court.

Our previous opinion set forth qualifications a motor-fuel importer must satisfy in order to obtain a license under the statute. Our decision became the law of the case and was followed by the District Court. The judgment of the District Court accordingly is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961
No. 16,742

CITIES SERVICE OIL COMPANY,

Appellant,

WALTER N. TOBRINER, ET AL., Commissioners of the District of Columbia and KENNETH BACK, Assessor for the District of Columbia,

Appellees.

Before: Wilbur K. Miller, Chief Judge in Chambers.

Order

Upon consideration of appellant's motion to stay transmission of the opinion and certified copy of the judgment of this court, and it appearing that no objections have been filed; it is

ORDERED that transmission to the District Court of the opinion and certified copy of the judgment of this court be, and it is hereby, stayed to and including June 30, 1962.

Dated: June 12, 1962.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961
No. 16,742

CITIES SERVICE OIL COMPANY,

Appellant,

v.

WALTER N. TOBRINER, ET AL.,

Appellees.

Before: Edgerton, Fahy and Washington,
Circuit Judges, in Chambers.

Order

Upon consideration of appellant's application for an injunction or for continuation of injunction heretofore granted, pending certiorari, and of appellees' opposition, it is

ORDERED by the court that the application be, and it is hereby, denied.

Per Curiam.

Dated: Jun 21 1962

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BRIEF FOR RESPONDENTS IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 211

CITIES SERVICE OIL COMPANY, *Petitioner*,

v.

WALTER N. TOBRINER, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

CHESTER H. GRAY,
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MILTON D. KORMAN,
Principal Assistant Corporation Counsel, D. C.
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PRINTING DIVISION—D. C. GOVERNMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 211

CITIES SERVICE OIL COMPANY, *Petitioner*,

v.

WALTER N. TOBRINER, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF QUESTION PRESENTED

Where the Court of Appeals, by an opinion and judgment, resolved issues pertaining to the statutory requirements for a license to import motor-vehicle fuel into the District of Columbia and such judgment was not challenged within the time and in the manner prescribed by 28 U.S.C.A., § 2101 (c), and now stands unmodified or otherwise disturbed, may petitioner who brought the action relitigate any of the issues resolved by the judgment?

STATUTES INVOLVED

In addition to the provisions of the Motor Fuel Tax Act, as amended, § 47-1903 (a), D. C. Code, 1961, set forth at pages 4 and 5 of petitioner's brief, the following additional provisions of such Act are involved:

Section 47-1902. *Definitions.*

* * * *

(c) The term "importer" means any person who brings into, or who produces, refines, manufactures, or compounds, in the District of Columbia motor-vehicle fuel to be used by him or to be sold * * *.

* * * *

(Apr. 23, 1924, 43 Stat. 106, ch. 131, § 2; Aug. 17, 1937, 50 Stat. 677, ch. 690, title III, § 2; May 16, 1938, 52 Stat. 358, ch. 223, § 3.)

Section 47-1904. *To render monthly report to assessor of amount of fuel sold.*

Each importer engaged in the District of Columbia in the sale or other disposition or use of motor-vehicle fuel shall render to the assessor of the District of Columbia, on or before the twenty-fifth day of each calendar month, on forms prescribed, prepared, and furnished by the said assessor, a sworn report of the total number of gallons of motor-vehicle fuel within the District of Columbia sold or otherwise disposed of by such importer * * *. Such report shall be sworn to * * * by the resident general agent, or attorney in fact, or by a chief accountant or officer in case of a foreign corporation * * *. (Apr. 23, 1924, 43 Stat. 107, ch. 131, § 4; Dec. 26, 1941, 55 Stat. 871, ch. 635, § 2).

Section 47-1905. *Invoices to be rendered by importers to all purchasers except in cases of retail sales.*

Invoices shall be rendered by importers and distributors to all purchasers from them of motor-vehicle fuel within the District of Columbia except in case of retail sales. Said invoices shall con-

tain a statement, printed thereon in a conspicuous place, that the liability to the District of Columbia for the tax herein imposed has been assumed by a licensed importer named in said statement and that the importer has paid the tax or will pay it on or before the twenty-fifth day of the calendar month next succeeding the purchase. (Apr. 23, 1924, 43 Stat. 107, ch. 131, § 5; Aug. 17, 1937, 50 Stat. 676, ch. 690, title III, § 4; Dec. 26, 1941, 55 Stat. 871, ch. 635, § 2.)

Section 47-1907. *Importer's records of transactions subject to inspection of assessor and collector.*

The records of all purchases, receipts, sales, other dispositions, and uses of motor-vehicle fuel of every importer, distributor, or dealer shall, at all times during the business hours of the day, be subject to inspection by the assessor and the collector of taxes of the District of Columbia, or by their duly authorized agents or by any other agent duly authorized by the Commissioners to make such inspection. (Apr. 23, 1924, 43 Stat. 107, ch. 131, § 7; Aug. 17, 1937, 50 Stat. 676, ch. 690, title III, § 5.)

Section 47-1911. *Violations—Penalty.*

Any person violating any provision of sections 47-1903 to 47-1906 inclusive, or section 47-1908, or refusing or obstructing inspection under section 47-1907, or falsely making any statement or report required by sections 47-1901 to 47-1916, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $50 nor more than $500 or by imprisonment for not more than one year, or by both such fine and imprisonment. (Apr. 23, 1924, 43 Stat. 108, ch. 131, § 11; Aug. 17, 1937, 50 Stat. 676, ch. 690, title III, § 7.)

Section 47-1916. *Commissioners to make necessary regulations.*

The commissioners may make such regulations as in their judgment are necessary for the administration of this chapter and may affix thereto such fines and penalties as in their judgment are necessary to enforce such regulations (in cases in which a penalty is not otherwise provided by law). (Apr. 23, 1924, 43 Stat. 110, ch. 131, § 18.)

COUNTER-STATEMENT OF THE CASE

Involved in a protracted legal controversy between the petitioner and the respondents has been the interpretation of provisions of the Motor-Vehicle Fuel Tax Law[1] which is concerned with the business of importing into the District of Columbia motor-vehicle fuels.

For the reason, among others, that it did not have in the District of Columbia a resident general agent, petitioner, a foreign corporation, was denied a license as an importer of motor-vehicle fuels for the year commencing July 1, 1957 (Appendix 8a-11a). Petitioner thereupon complained in the United States District Court for the District of Columbia that the denial of such license was wrongful and demanded declaratory and mandatory injunctive relief (Appendix 1a-4a).

The proceedings which followed resulted in a determination by the District Court, on October 3, 1960, that petitioner, as a condition precedent to the approval of its application for a motor-vehicle fuel importer's license, was required to designate a resident general agent (Appendix 67a, 68a).

Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit and that Court, in an

---

[1] 43 Stat. 107, c. 131, as amended, D. C. Code, 1961, § 47-1902, *et seq.*

opinion and judgment entered May 25, 1961,[2] vacated the judgment of the District Court and remanded the case with instructions saying:

> * * * The District Court denied relief because it thought the statute required a foreign corporation to designate a resident general agent in order to get a license.
>
> We interpret the statute somewhat differently. If the corporation does not have a representative within the District who is a "resident general agent" the statute does not require the corporation to procure and designate an agent of that description. However, considering the nature of the business of importing motor fuel, the supervision of such business intended by the Motor Fuel Tax Law, and the Article 26 regulation referred to above, the importer, to qualify for a license, is required to designate a local representative and maintain a local office or place of business within the District of Columbia. In the absence of an agent known as a "resident general agent," compliance with the licensing statute requires the designation in the application of such a representative as the regulation specifies. We think this is a reasonable construction of the statute. It avoids giving the reference to a "resident general agent" a construction which requires an agent of that precise description, while at the same time it does require a local representative of requisite authority to be designated and specified in the application for a license.
>
> *In order to afford an opportunity to permit compliance in accordance with this opinion, the judgment of the District Court is vacated and the case is remanded for further proceedings not inconsistent with this opinion.* [Emphasis supplied.] (Appendix 69a, 70a.)

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[2] *Cities Service Oil Co.* v. *McLaughlin, et al.*, 110 U. S. App. D. C. 266, 292 F. 2d 759.

A "Motion for Leave to File a Petition for Rehearing and to Recall and Stay Judgment" was, by order of the Court of Appeals entered July 18, 1961, denied (Appendix 71a).

On October 4, 1961, petitioner filed in the United States District Court for the District of Columbia a motion

> • • • for a hearing, pursuant to the judgment of remand by the United States Court of Appeals for the District of Columbia Circuit entered May 25, 1961, *to determine the necessary requirements for plaintiff to obtain a motor fuel importer's license in the District of Columbia pursuant to Section 47-1903 District of Columbia Code, 1951 Edition,* • • •. [Emphasis supplied.]. (Appendix 45a-46a.)

Filed with the motion was the form of application referred to therein (Appendix 46a-48a). Upon consideration of the motion (Appendix 54a-62a), it appeared to the District Court that petitioner had not complied with the requirements set forth in the opinion and judgment of the Court of Appeals entered May 25, 1961 (Appendix 59a, 60a). The District Court thereupon entered an order which reads, in part:

> ORDERED: That the motion of plaintiff to direct the defendants to accept plaintiff's application for license as a motor vehicle fuel importer in the District of Columbia dated August 16, 1961, and to issue a license thereon to plaintiff, or, in the alternative, for a trial be, and the same hereby is, denied and the complaint herein be, and the same hereby is, dismissed (Appendix 72a).

The United States Court of Appeals for the District of Columbia Circuit, in an opinion and judgment entered May 31, 1962, unanimously affirmed the judgment of the District Court, saying:

> Our previous opinion set forth qualifications a motor fuel importer must satisfy in order to obtain a license under the statute. Our decision [3] became the law of the case and was followed by the District Court * * * (Appendix 76a).

The Court of Appeals, on June 21, 1962, denied petitioner's application "for an injunction or for continuation of injunction [t]heretofore granted, pending certiorari." (Appendix 78a.) Petitioner thereafter applied to the Supreme Court for an order (1) staying the execution of and enforcement of the judgment entered May 31, 1962, and (2) restraining the respondents from restricting or interfering with petitioner in the importation and distribution of motor fuel in the District of Columbia pending disposition of petition for writ of certiorari. Mr. Justice Black, on July 3, 1962, denied the application.

ARGUMENT

Because no question of substance is involved the petition for writ of certiorari should be denied.

Petitioner would have the Supreme Court review on writ of certiorari the judgment of the United States Court of Appeals for the District of Columbia Circuit entered May 31, 1962, in *Cities Service Oil Co.* v. *Tobriner, et al.*, ___ U. S. App. D. C. ___, ___ F. 2d ___. The Court of Appeals said in that case:

> Our previous opinion set forth qualifications a motor-fuel importer must satisfy in order to obtain a license under the statute. Our decision became the law of the case and was followed by the District Court. * * * (Appendix 76a.)

---

[3] *Cities Service Oil Co.* v. *McLaughlin, et al.*, 110 U. S. App. D. C. 266, 292 F. 2d 759.

The "previous opinion" referred to was rendered May 25, 1961, in the case of *Cities Service Oil Co.* v. *McLaughlin, et al.*, 110 U. S. App. D. C. 266, 292 F. 2d 759. The judgment in that case was on the merits and settled beyond any question that a foreign corporation applying for a license to import motor-vehicle fuels into the District of Columbia must, if it does not have a resident general agent, "* * * designate a local representative and maintain a local office or place of business within the District of Columbia * * *" (Appendix 69a, 70a).

Following the denial of its motion for leave to file a petition for rehearing and to recall and stay judgment (Appendix 71a) petitioner did not challenge further the judgment. Because the matters thus finally determined by the Court of Appeals were within the jurisdictional sphere of the case as presented, the judgment is conclusive on petitioner not only as to the disputed questions of law and fact which were resolved but also as to all such questions that were open to consideration even though not specifically raised on appeal. See in this connection *United States* v. *Munsingwear*, 340 U. S. 36, 38, 95 L. Ed. 36; *Commissioner* v. *Sunnen*, 333 U. S. 591, 597, 92 L. Ed. 898; *Werlein* v. *New Orleans*, 177 U. S. 390, 44 L. Ed. 817.

The reasons assigned by petitioner for the issuance of the writ of certiorari are in substance that (1) it was denied a trial, (2) the Court of Appeals "departed from the judicial function and entered the area of the administrative function," (3) the regulations made pursuant to the Motor Fuel Tax Act somehow transcended the "requirements of the statute," and (4) "obiter dictum as to matters previously not litigated cannot become the law of the case." These contentions, however, amount to nothing so much as an attempt to relitigate in this Court issues finally resolved by the judgment of the Court of Appeals in *Cities Service Oil Co.* v. *McLaughlin, et al., supra.*

No principle of law is more firmly established than that matters finally disposed of and determined by an appellate court cannot be relitigated. When therefore the Court of Appeals in deciding *Cities Service Oil Co.* v. *McLaughlin*, vacated the judgment of the District Court and remanded with specific instructions "* * * to afford an opportunity to permit compliance in accordance with this opinion, * * *" (Appendix 70a), the trial court was required to carry the judgment into execution in a manner consistent with the directions in the opinion. In this connection the Supreme Court said in *Ex parte Union Steamboat Company*, 178 U. S. 317, 44 L. Ed. 1084:

> The duty of an inferior court upon receiving the mandate of this court is nowhere better described than by Mr. Justice Baldwin in an early case upon that subject (*Sibbald* v. *United States*, 12 Pet. 488, 492, 9 L. ed 1167, 1169): "Whatever," said he, "was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; nor intermeddle with it, further than to settle so much as has been remanded. * * *"

In view of the foregoing, the conclusion is compelled that petitioner has failed utterly to assert any ground for review conceivably falling within the standards and considerations governing review on certiorari as prescribed by Rule 19 of the Rules of the Supreme Court of the United States.

CONCLUSION

Because no question of substance is involved, respondents respectfully submit that the petition for writ of certiorari should be denied.

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